JUDICIOUS JUDGMENTS?

Judicial Definitions of Sexual Violence: Examining the Impact of Sexual Assault Legislation

A Thesis
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by

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ABSTRACT

In an attempt to eradicate biases in substantive law and evidentiary procedures, legislative changes were implemented for sexual offences in 1983. Historically, biases in rape law had resulted in high attrition of cases at each stage of criminal justice processing, low conviction rates, and poor treatment of victims. The new legislation, which included the introduction of the offence `sexual assault', was designed to emphasize the violent nature of sexual aggression rather than the sexual nature.

Law reform, however, is influenced by the response of the criminal justice personnel who must implement the new legislation. Judges are critical personnel within this framework because they both implement the reform in individual court cases and interpret the meaning of the new law. It is critical, therefore, to examine judicial understanding of the social, political, and economic meaning of the law, and more specifically, to examine their understanding of the nature of sexual violence.

Using a content analysis of 109 `remarks at sentencing', this study examines the impact of the 1983 reform on judicial definitions of sexual violence. The sentencing `transcripts' are drawn from 66 sexual offence cases heard at the Court of Appeal for Saskatchewan between 1975-1988. Transcripts are analyzed for the absence or presence of references to each of 9 themes (violence, coercion, physical impact of the offence

on the victim, psychological impact of the offence on the victim, breach of trust, the significance of penetration, the accused's criminal history, the role of alcohol or drug abuse, and the accused's control over his sexual drive). Each theme reflects an influential variable in judicial decision-making concerning sexual offences.

The results of the study indicated that since 1983, judges mention each theme, except for coercion, more frequently and suggest that judges are attempting to reflect the 3 tier classification of sexual assault outlined in the new legislation. At the same time, however, judicial definitions of these variables continue to reflect stereotypes and myths associated with sexual violence. Judicial responses to sexual violence tend to minimize the culpability of sexual offenders and to minimize the seriousness of the offence. One of the most significant findings was that the `sexual' element continues to dominate judicial definitions of sexual aggression rather than the `violent' element. This emphasis implies that `coercive' sexual acts have the same sexual character as `consensual' sexual acts.

It appears, therefore, that the reform has been unsuccessful in meeting its objectives at the judicial level. However, the small change which has occurred may lay the groundwork for further change in the future.

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I dedicate this work to you.

MEMORIAL

In Memory of

CINDY BLAZIUK

Sexually assaulted and murdered, December 1986
at the Onion Lake Reserve, Saskatchewan

and

LORI LEE-KNIGHT

Sexually assaulted and murdered, August 1986
at London, England

Your tragic deaths constantly remind me
that I have an obligation and a personal reason
to fight for safety and justice for women.

Your friendship, though brief, will always be
treasured. Your deaths, which epitomize
the harshest reality of violence against women,
will always be remembered.

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CHAPTER 1: INTRODUCTION

1.1 INTRODUCTION

During the 1960s and 1970s, rape emerged as a significant social problem and a symbolic component of the women's equal rights movement (Chappell, 1984:72). Feminists vehemently attacked the inappropriate response of the criminal justice system to the problem of rape. Feminists demonstrated that rape case processing was characterized by high attrition of cases at all levels of the criminal justice system, from initial contact with the police through to sentencing. Feminists maintained that victims were victimized twice; first by the violent encounter and then again by a criminal justice system which put the victim's behavior rather than the offender's behavior on trial. Feminists concluded that the law itself was biased. Rape law, they argued, reflected myths and inaccurate conceptions of rape, and as a consequence, women would never obtain justice without substantial change. As a result, demands for reform of rape legislation became a major political focus of feminists.

In Canada, after more than a decade of debate, the federal government passed Bill C-127.[1] This bill was proclaimed law on August 4, 1982 and went into effect in January, 1983. The new law contained significant changes: it eliminated the offences `rape' and `indecent assault' and replaced them with a three-tier classification of `sexual assault'; it clarified certain rules of law governing the

conduct of rape trials and eliminated others, such as the corroboration requirement, which historically made convictions difficult to obtain; it `degenderized' the offences so they were applicable to members of either sex; it eliminated spousal immunity to allow for the prosecution of a spouse with whom the complainant is still living; and it moved sexual offences from Part IV "Sexual Offences, Public Morals, and Disorderly Conduct" to Part VI of the Canadian Criminal Code "Offences Against the Person and Reputation" in order to more accurately reflect the violent, personal nature of sexual assault.

Despite these legal reforms, many feminists maintain `justice' will still be elusive for many victims of sexual violence. They argue that changing the content of the law does not by itself necessarily ensure that the implementation of the changes will reflect the objectives of the legislators. Because the success of law reform is, in part, dependent upon the way criminal justice personnel actually implement it, many feminists are now evaluating its actual impact on the treatment of sexual violence in the criminal justice system.

Within this framework, judicial decision-making has become a major area of debate. Because judges both adjudicate individual cases and interpret the law, judicial decision-making is a critical part of the reform process. When judges interpret laws, they are influenced by the content of the legislative law, but also determine its meaning (Payne,

1981; Caringella-MacDonald, 1988). In addition, with the passing of the Charter of Rights and Freedoms, judges have new powers to interpret substantive legislation and have thus assumed an "overtly political role" (Mahoney and Martin, 1987:iii). Judges are in a "unique position to promote or reduce gender equality in law" (Mahoney and Martin, 1987:iii) which is conditioned by judges' understanding of the social, political, and economic meaning of the law (Boyle et al.,1985:59).

This study examines the impact of the 1983 reforms on judicial definitions of sexual violence. It is argued that, despite these reforms, judges continue to use definitions of sexual violence based on stereotypes and myths which do not accurately reflect the nature of sexual violence and its impact on women. The study is based on a content analysis of 109 "remarks at sentencing" from 66 sexual offence cases heard at the Saskatchewan Court of Appeal between 1975 and 1988.

The following discussion examines the significance of judicial definitions of sexual violence for the reform process. This is followed by a discussion of the myths which may inform judicial perceptions of sexual violence, and concludes with an overview of feminist theoretical approaches to law reform. Chapter 2 provides a detailed discussion of the issues which generated the demand for reform and the history of the subsequent reform process in Canada. It provides an outline of significant changes to the law and

discusses the objectives of the reform. It concludes with a discussion about research which has evaluated the success of the reform in meeting these objectives. Chapter 3 discusses methodological considerations for the study, while Chapter 4 presents the findings and analysis of the study. The implications of the study and suggestions for further research are addressed in the final chapter.

1.2 JUDICIAL DECISION-MAKING

Because judges adjudicate individual cases and interpret law, judicial decision-making is a critical part of the reform process. Since judges exercise a great deal of control over what actually occurs in court, judicial interpretation and application of sexual assault legislation is important. Although a number of rules of law governing the conduct of sexual assault trials are outlined in the new law, judges may influence the trial outcome by ruling on the admissibility of evidence, particularly concerning the complainant's sexual history, by influencing jurors through demeanour or subtle behavior, or by ruling on motions and the instruction to the jury (Marsh et al.,1982:58). The kinds of evidence admitted into court by a judge can have tremendous impact on the atmosphere in court and on the victim's reaction to the court experience (Bohmer, 1977:165).

Second, judges exercise a great deal of discretion in determining appropriate sentences. There is a major

discrepancy between the formal guidelines provided by the law, which provide a maximum sentence of life imprisonment for rape and some forms of sexual assault, and the actual sentences imposed by judges (which average from three to seven years) (Boyle, 1984:171; Clark and Lewis, 1977). It is important, therefore, to investigate and analyze some of the unofficial rules which guide judicial decisions (Boyle, 1984). This has become even more important since the 1983 amendments enhanced judicial discretion. "[T]here is a danger that many of the objectionable features of the former substantive features and evidentiary provisions relating to sexual offences will now re-emerge at the sentencing stage" (Ruebsaat, 1985:94).

Given the discretionary power of judges, it is important to examine the kinds of bias which may potentially inform judicial decision-making. There are three kinds of judicial bias recognized by law, including: a pecuniary interest in the outcome of the decision; adversity or favoritism towards one of the parties due to a previous association; or predetermination of the issue based on preconceived ideas and stereotypes (Boyle and Worth-Rowley, 1987:313). Demonstrating bias in legal terms, however, has been problematic. The narrow application of these biases to individual court cases rather than to issues or groups and the premise of conscious prejudgment rather than unconscious attitudes and stereotypical thinking limit their utility in guarding against gender bias (Boyle and Worth-Rowley, 1987:313). In addition,

feminists argue that legal definitions of bias reflect `male' definitions created by the male dominated justice system. These definitions legitimate male definitions of impartiality and diminish challenges to male power (Boyle and Worth-Rowley, 1987:312). According to this argument, using legal definitions of gender bias is much like asking the fox to guard the chicken house!

Much broader definitions of gender bias have been utilized in feminist analyses. Brown (1988:1) referred to the "unacknowledged phenomenon which negatively affects women's lives" as "gender unfairness". Others define gender biases as the manifestation of attitudes and behavior based on stereotypes and myths about the appropriate roles of, and relative worth of, men and women and misconceptions about the economic and social problems encountered by both sexes (Brown, 1988:i). This definition indicates that both genders are influenced by stereotypes and myths and that biases may be reflected in various forms.

Using these definitions, feminists have documented the presence of pervasive judicial gender biases. One form of bias documented includes overt discrimination, such as sexist and inappropriate forms of address, such as `love' or `dear', to women lawyers, litigants and witnesses (Brown, 1988; Bond and Adams, 1988) as well as statements about the victim's physical attributes and appearance (Brown, 1988:8). In addition, research indicates judges' attitudes reflect

prevailing myths and prejudices (Gager and Schurr, 1976; Wikler, 1980; Brown, 1988) such as the belief that women are inferior (Johnston and Knapp, 1971) and that women often falsely accuse men of sexual attacks (Bohmer, 1977; Backhouse, 1987).

The prevalence of a belief in victim precipitation has also been documented. For example, in describing cases in which they felt the victim contributed to her own victimization, judges in Bohmer's study (1977:165) graphically described the situations as "friendly rape", "felonious gallantry", "assault with failure to please", and "breach of contract". Hecht Schafran (1987) had similar findings, including an example in which a judge described a 5 year old victim as "an unusually promiscuous lady" (cited in Brown, 1988:9).

In addition, Backhouse (1987:271) found that judges believe women should be in subordinate, domestic roles within a family structure. In general, judges favor traditional roles and institutions (Wikler, 1980; Brown, 1988; Bond and Adams, 1988).

These sexist attitudes are also manifested in the final disposition of cases. In examining the outcomes of civil cases concerning spousal maintenance, child custody, access, and support, marital property divisions, and personal injury damages, Brown (1988) and Bond and Adams (1988) established that judicial decisions frequently do not reflect the social

and economic reality of women's lives. In criminal dispositions for offences such as rape/sexual assault and domestic violence, legal devices, such as the corroboration requirement and an emphasis on the sexual history of the victim, and narrow interpretations of the law have functioned to `protect' only certain woman, such as virgins, while excluding others such as sexually active single (non-married) women. Unfortunately, the groups excluded may be the majority of victims (Bond and Adams, 1988; Boyle, 1984). Finally, the sentences assigned for these crimes have been denounced as inadequate compared to the treatment of other crimes of violence and defined as not representative of the violence typically involved.

1.3 THE INFLUENCE OF MYTHS

These biases and sexist attitudes reflect a number of popular myths about women and their place in the world. Of special interest for this study are myths about rape which may influence judicial understandings of sexual violence.

One set of myths revolves around the issue of victim credibility. It is believed that women frequently lie and that they will falsely accuse men of rape. According to these myths, false accusations may result from attempts by a woman to "get even" with a male who has slighted her or may reflect attempts by a woman to hide her own promiscuity. A number of legal rules in rape trials, which were not required for other

offences, were premised on this belief and theoretically functioned to protect innocent men from false accusation. Because many of these legal rules had stringent requirements which made conviction difficult, this myth had a significant impact on the way female victims were treated by the criminal justice system.

The second significant set of myths revolve around the stereotypical image of rape. According to this stereotype, rape is perceived as a sudden attack in a dark and deserted public place such as a back alley or park, by a stranger seeking sexual gratification. Penile-vaginal penetration is perceived as the ultimate violation which could occur in such an attack. Implicit in this stereotype is the belief that sexual aggression is the expression of uncontrollable sexual drives resulting from sexual deviancy or mental illness, cultural expectations such as subgroup pressures, or victim provocation. These myths result in a number of misconceptions about rape.

First, these myths imply that rapists have specific, identifiable characteristics which distinguish them from non-rapists. Sociologists have attempted to identify these unique characteristics. For example, Amir (1967; 1971) utilized a `subculture of violence' theory [2] to explain the predominance of young, black rapists. As members of socially disadvantaged groups, Amir maintained, rapists could use violence to both fulfil their sexual needs and to reinforce

their macho image (LaFree, 1979:4). However, Amir's study has been criticized for its class and race biases. Because he did not critically analyze the police information, which defined rape as a lower class, black phenomenon, or the social process by which an event is defined and treated as rape by the Criminal Justice System, Amir provided a racist explanation of the phenomenon. Contrary to Amir's assumption, Clark and Lewis (1977) found that rapists are members of all class, race, and age backgrounds. Furthermore, most rapists are psychologically `normal' and their belief systems used to justify rape often rely on behavior that is culturally accepted and desired (Clark and Lewis, 1977).

The stereotypical image of rapes being perpetrated by strangers has also been challenged. Victimization data have demonstrated that sexual violence is not a crime committed by dangerous strangers, but rather a large proportion of sexual offences involve relatives, friends, or acquaintances. For example, the Canadian Urban Victimization Survey (1984) found that 41% of the sexual assault victims in their study knew their assailants.

These myths also imply that sexual offences involve a form of sexual gratification. This belief has been challenged in a number of ways. For example, Groth and Burgess (1978) refer to rape as a "pseudo-sexual act" because many rapes are accompanied by dysfunctional sexual behavior such as impotency. In addition, many forms of sexual violence do not

involve the accused's genitalia and are accompanied by a serious degree of violence, humiliation, planning or manipulation. Amir (1971) found that 71% of the cases he studied were preplanned rather than spontaneous acts of passion. In addition, an explanation based on `passion' can not account for the age range of victims; ranging from newborns to the very elderly.

Finally, these myths perpetuate a `blaming the victim' ideology by implying it is something about the victim which incited the accused's behavior. Two subsidiary myths reinforce these beliefs. First, it is argued that if a woman really does not want to be raped, rape is impossible. This argument ignores differential power relationships between men and women in society generally, and in the context of rape specifically. For example, the attacker might have a weapon or be physically advantaged in size and strength; there may be a number of attackers involved; or the victim may be unconscious, or paralysed with fear (Schwendinger and Schwendinger, 1983:68; Canada: Ministry of the Solicitor General, 1984b:21).

Second, it is argued that women `ask for it' when they place themselves in vulnerable places or act inappropriately. In an attempt to explain how certain women contribute to their own victimization, Amir delineated the controversial classification of `victim precipitation' (LaFree,1979:4). According to his definition, `precipitory' behavior included

failing to resist sexual overtures with sufficient vehemence (LaFree, 1979:4); acting in ways "contrary to female propriety" (Bessmer, 1984:286); or engaging in behavior which the offender interprets as indicating consent such as wearing provocative clothing, talking to male strangers, or accompanying a male into a residence (Schwendinger and Schwendinger, 1983; Bessmer, 1984).

Amir's concept has been vehemently attacked by feminists. According to Weis and Borges (1973), this concept is "the personification and embodiment of the rape mythology cleverly stated in academic-scientific terms" (Weis and Borges, 1973 cited in Chappell et al., 1977:22). Bessmer (1984:287) maintained that Amir did not delineate the differences between various rape events and victims but rather has portrayed what "HE thinks is appropriate behavior for women." Schwendinger and Schwendinger (1983:65) criticized this notion for its acceptance of stereotypical standards of male and female sexuality. They claimed it presupposed `appropriate female behavior' as a given rather than socially constructed and stated that the logical conclusion of Amir's argument is that, ultimately, ANY behavior by women, even their very presence, can be construed as contributing to their victimization (Bessmer, 1984; Schwendinger and Schwendinger, 1983).

The inadequacy of the `victim precipitation' explanation is highlighted by the fact that Amir's data contradict his own hypothesis. The data show a greater degree of coercion in the

so-called victim precipitated rapes (93%) than in the non-precipitated rapes (83%), suggesting that rapists recognize a victim's refusal but proceed anyway. Following a rapist's initial attempts to force sexual intercourse, a woman's behavior will not affect the outcome (Bessmer, 1984: 285). The woman's behavior prior to the event is equally irrelevant since 81% of victims did nothing to bring on the attack other than be present at the scene (Bessmer 1984:286). For example, the woman may have been asleep when attacked. In addition, rapes frequently occur in `safe' zones such as in or near the woman's home. The Canadian Urban Victimization Survey found that 21% of the rapes recorded occurred inside the woman's own residence while an additional 11% occurred in the home of a friend or acquaintance or in the vicinity of the victim's home. One half (50%) of the actual rapes occurred in the victim's home, whereas attempts (36%) and molesting (50%) most often occurred in outside places. One half of the attacks which occurred in the home involved illegal entry (Canadian Urban Victimization Survey, 1985).

1.4 THEORETICAL CONSIDERATIONS

Much of the early feminist literature focused on debunking these prevalent myths about rape and sexual violence. There was general agreement among feminists that rape was a social problem, rather than a manifestation of the behavior of a few deviant individuals. They argued that the

prevalence of these myths illustrated that societal definitions of sexuality and appropriate male/female roles in society played a major role in the perpetuation of sexual violence against women. Feminists also agreed that the response to rape by the criminal justice system was inadequate and discriminatory in such a way that many women were victimized by the response of the criminal justice system as well as by the sexual offender.

These early analyses of rape were characterized by discussions of concrete issues and limited theoretical development (Boyd and Sheehy, 1986:33). There followed a shift toward a theoretical understanding of the causes of rape and rape was identified as a specific source of women's oppression. As feminist jurisprudence matured, assessments of the impact of law and law reform on women's lives emerged. Demands that women's experiences be included in the design of legal rules challenged previously conceived notions of what constitutes a legal problem (Greshner, 1988). Furthermore, these demands represented a growing awareness that formal equality in the law does not guarantee substantive equality. Consequently, feminist analyses of the law have now shifted to an examination of the very structure of law; that is, an examination of its utility as a means to achieve equality for women.

Although feminists share common concerns about the presence of myths and the inadequacy of the criminal justice

response to rape, the explanations of the role of law and the subsequent agendas for change, both short and long term, vary dramatically. There are three perspectives which have influenced the development of feminist jurisprudence. The following discussion examines how liberal feminism, radical feminism, and socialist feminism each reflect a specific interpretation of the state and the role of law in achieving equality for women. It is important to note that the following discussion deals with the `ideal types' of each of these perspectives and that in reality there is often some overlap between them.

1.4.1 Liberal Feminism

According to the liberal paradigm, inequality for women reflects two types of `discrimination'. "Social discrimination" involves negative attitudes about women and their place in the world in general. "Legal discrimination", on the other hand, is manifested when these attitudes function in specific legislation so that different responsibilities and opportunities for men and women result (Keet, 1988:8).

Liberal feminists maintain that both types of discrimination influence society's response to rape. First, discrimination is reflected in the prevalent myths about rape which exist and second, it exists in the rape law itself. They argue that gender-neutral rape laws mask the specific harm rape causes to women and that vague definitions of sexual

assault reinforce male conceptions about women and sexual violence in such a way that women are not treated fairly by the law (Boyd and Sheehy, 1986:25).

Eliminating these forms of discrimination as they relate to rape and sexual violence is a major political goal for liberal feminists. Because they believe that the state acts as a neutral arbitrator between interest groups, liberal feminists maintain that the way to eliminate these forms of discrimination is through the application of laws (Boyd and Sheehy, 1986:21) which guarantee equal opportunity and treatment for members of both sexes. Education is also a primary tool in the reform process because change is accomplished by disseminating accurate information about sexual violence and by eliminating the irrational biases which previously guided the individual, group, or law.

Radical and socialist feminists criticize this approach as a form of `reform politics' which attempts to change the symptoms of the problem rather than addressing its root causes (Caringella-MacDonald, 1988:125). Radical and socialist feminists argue that liberal feminists do not explain why it is predominantly women who are raped and fail to address the conditions which produce wide-spread male sexual aggression (Caringella-MacDonald, 1988:1388). In addition, radical and socialist feminists maintain that liberal feminism reflects a naive conception of the state and the criminal justice system (Caringella-MacDonald, 1988:125). For example, in

attempting to make the treatment of rape more similar to the treatment of other violent crimes, liberal feminists have blindly accepted that other criminal justice processes are fair (Caringella-MacDonald, 1988:138). The other two perspectives propose a more critical examination of the role of the state and law.

1.4.2 Radical Feminism

The radical feminist perspective has been one of the most influential approaches in the analysis of rape. For radical feminists, the sexual division of labour is the first and foremost source of oppression for women. Patriarchy, or male domination, exerts control over all aspects of women's lives, particularly their sexuality, and permeates all social, political, and economic institutions. "The desire for supremacy, the psychological pleasure of power, and male fear of female sexual and reproductive capacity have all been identified as motivating forces of patriarchy" (Boyd and Sheehy, 1986:notes). As extensions of patriarchal control, laws protect male interests and extend male control over women's sexuality rather than protecting women (Boyd and Sheehy, 1986).

According to this perspective, rape is a mechanism used by men to control women (Griffin, 1977 ; Brownmiller, 1975 ; Clark and Lewis, 1977) and rape laws function in such a way to guarantee that control. Clark and Lewis (1977) developed

the most coherent theoretical argument about rape laws developed within this perspective. They maintained that rape laws were designed to protect males' `private property' rather than the integrity of the individual. According to traditional sex roles, women are taught to hoard the commodity `sexuality' as a bargaining tool to obtain marriage and economic security (Check and Malamuth, 1985:44). It is further argued that women's sexuality and reproductive capacities belong to males as a commodity, and it is the male owner of the commodity who is the injured party when a woman is raped. It follows, therefore, that rape laws were not designed to protect women from rape per se, but rather to protect male owned private property (Goldsberry, 1979:14). The spousal exemption, that is that a man can not rape his own wife, illustrates the belief that women are only `trustees' of their sexuality, which they hold in trust for their husbands. Rape laws, therefore, ultimately protect male interests rather than female safety. Further evidence of the `private property hypothesis' was provided by the criminal justice system's response to victims of rape in which victims who fell outside `male-owned relationships' (i.e. wife/dependent daughter status) were not likely to have their rape experience treated seriously (Clark and Lewis, 1977; Boyd and Sheehy, 1986).

Recent analyses have built upon this `private property hypothesis' to explain developments in rape/sexual assault

legislation. For example, Backhouse (1983) claims that even though new sexual assault legislation seems to emphasize protection from assault, judicial interpretations of the new laws continue to support the property model (Boyd and Sheehy, 1986:4). Boyle (1984) states that the contradictory legal protection provided to rape/sexual assault victims results because male lawmakers simultaneously view themselves both as aggrieved `owners' who need adequate `justice' when a violation has occurred and as potential `accused' who need to be protected from false accusations of sexual attacks (Boyd and Sheehy, 1986:5).

These explanations of the role of rape laws are based upon an `instrumentalist' explanation of the state. That is, according to these theorists, the state is an instrument used by and for the power holders in society-- males. Laws are extensions of patriarchal control and, therefore, protect male interests and extend control over women's sexuality (Boyd and Sheehy, 1986). To achieve equality, therefore, women must also obtain positions of power and have direct input into the creation and implementation of laws. Law reform in itself is inadequate due to the patriarchal character of the state (Caringella-MacDonald, 1988).

Socialist feminists have challenged many of the major tenets of the radical feminist perspective, including the `private property' hypothesis about the role of rape laws. For example, Gavigan (1986)(cited in Boyd and Sheehy, 1986:31)

argues that this hypothesis is too simplistic because women are not merely `owned' by males. Schwendinger and Schwendinger (1983:81) maintain that relationships between men and women are not determined only by coercion and commodity exchange practices. Rather, factors such as love, race, class, and religion are also important influences in the exchange of sexual relations. Further, Boyd and Sheehy (1986:5) point out that the analysis has been weakened because the creation of the offence `sexual assault' removed the overt vestiges of rape as an offence against private property. Socialist feminists also criticize the radical feminists' view of the state and patriarchy. They maintain that an adequate explanation of sexual aggression and its treatment by the state must account for class and race issues as well as gender issues.

1.4.3 Socialist Feminism

According to socialist feminists, inequality for women is based on the social relations of production and reproduction; that is, patriarchal and class relations intersect to produce gendered inequality. Socialist feminists, therefore, maintain that while patriarchy has extended across most (but not all) modes of production, the historical specificity of different patriarchal forms must be taken into account. For example, one must distinguish women's oppression under feudal society from the oppression under

advanced capitalism (Boyd and Sheehy, 1986:26).

According to this perspective, law is a social phenomenon and an arena of struggle. The form and content of laws are determined by the balance of social forces, not the wills or needs of a specific gender or class group, and they are not independent of the power relations between classes and between the sexes (Fine, 1984; cited in Keet, 1988). In addition, the law plays an ideological role in maintaining hegemony or legitimacy of the state and the broader social order (Boyd and Sheehy, 1986:30). While law reform does not address the existence of structural inequalities, socialist feminists maintain that change can be achieved through law reform. Thus the historical significance of early feminist battles, such as securing the vote, are acknowledged even though substantive inequality persists (Boyd and Sheehy, 1986:30).

From this perspective, rape laws reflect the social relations of the society in which they are formed and reflect the historical and social context of that society. For example, according to feudal rape laws in Great Britain, the husband or father of victims from certain social classes received monetary compensation when a woman was raped. This law reflected the direct control males had over women and their sexuality (Clark and Lewis, 1977). As capitalism developed, women's oppression took on a new form in which women were segregated in the household and became economically dependent upon the male's wage. When women gained legal

status as `persons' with `rights', rape laws also changed from the overt protection of male property to the protection of women and their sexuality. The emphasis on `chastity' in rape law and trials, however, illustrated that women remained only the `trustees' of their sexuality rather than the `owners'. Within advanced capitalism, where women have formal legal equality if not substantive economic and social equality, sexual offences laws must at least seem to protect the integrity of the individual. Rape laws, which were based on archaic beliefs about women and their place in society, did not protect women's integrity and failed to reflect the change in women's status in society. As a result, law reform was introduced to update the law to more adequately reflect the changes in women's status.

Caringella-MacDonald (1988:139) argues that the struggle to introduce legislative rape reform may have been successful because it reflects contradictions within modern capitalism, such as the conflict between the interests of the state and those of the economy, as well as conflicts `within' and `between' genders, classes, and races. But, she argues that the reform "does not constitute a fundamental threat to status quo inequalities" (Caringella-MacDonald, 1988:139) such as economic, social, and political disparities between the genders.

However, because law reform is an arena of struggle which reflects the contradictory nature of law, the potential for

change should not be ignored (Caringella-MacDonald, 1988:139). Any advances which may result, such as consciousness raising among criminal justice personnel, could lead to better treatment for victims of sexual attacks and may lay the groundwork for further change in the future (Caringella-MacDonald, 1988:139).

As indicated above, the socialist feminist analysis locates law reform within the notions of `struggle' and `contradictions'. It recognizes, therefore, both the potential and limitation of law reform. The following analysis is located within this perspective. Accordingly, rape reform is not conceptualized as a means of challenging the fundamental social, political, and economic inequalities women encounter, but rather as an arena of struggle from which advances in the treatment of women victimized by sexual aggression may be achieved. It is argued that even limited changes are positive because they lay the ground for future changes and security for women who have been victimized by sexual aggression. The broader issue of structural inequality is not addressed, although it is recognized that

> until structural inequalities and the pervasive violence that these engender are addressed, it can be expected that women as a group will continue to be victimized in the arms of men and the law (Caringella-MacDonald, 1988:139).

CHAPTER 1 NOTES:

1.(An Act to amend the Criminal Code in relation to sexual offences and other offences against the person 1980-81-82-83 (Can.), c.125).

2.Wolfgang and Ferracuti (1967) maintained that subgroups of under-privileged, black, male youths would use violence to obtain desired goods which they were otherwise powerless to obtain. Such violence also functioned as a measure to evaluate member's conformity to the `machismo' lifestyle of the group (LaFree, 1979).

CHAPTER 2: HISTORY OF RAPE REFORM

2.1 INTRODUCTION

While there were general concerns about the breakdown in law and order, rising crime rates, and leniency towards offenders throughout the 1960s and 1970s (Chappell, 1984:72), specific criticisms were directed at the treatment of rape in the criminal justice system. The feminist literature predominantly focused on the problems of rape case processing in the Criminal Justice System and problems with the law itself. Feminists maintained rape was not treated seriously (Clark and Lewis, 1977). Rather, rape case processing was characterized by high attrition of cases at all levels from initial contact with the police through to sentencing; low conviction rates; and low sentencing outcomes (Clark and Lewis, 1977; LaFree, 1979; Goldsberry, 1979). In addition, feminists maintained, victims were victimized twice; first by the violent encounter and then again by a justice system which put the victims' behavior rather than the offenders' on trial. Feminists concluded that the law itself was biased. The inadequacies of rape case processing and the biases of the rape law highlighted by feminists are summarized in this chapter.

2.2 RAPE CASE PROCESSING

There was general feminist agreement concerning the inadequacy of the criminal justice system's response to rape.

First, it was demonstrated that the reporting rate of rape, like the reporting rate of most other crimes of violence against the person, was low. Although the reporting rates were not markedly different from other violent crimes, the reasons for not reporting differed. For example, while robbery and assault victims said the event was `too minor' or `the police can't do anything', rape/sexual violence victims cited fear of retaliation by the offender and concern about the attitudes of the public and criminal justice personnel as reasons for not reporting (Minch et al., 1987:402; Canadian Urban Victimization Survey, 1984).

This concern may be justified. Respondents who do report sexual assault characteristically define the police response as `poor' (Canadian Urban Victimization Survey, 1985). Minch et al. (1987:392) found that 52.6% of the cases they studied were filtered out at the police level for the following reasons: the victim dropped the charges; no suspect was apprehended; or the police listed the case as `unfounded'.

The police designation `unfounded' was severely criticized because it reflected police biases against certain victims and a concern by the police to obtain a conviction rather than whether an assault actually occurred (LeGrand, 1977; Gager and Schurr, 1976; Clark and Lewis, 1977)). Reasons a complaint might be listed as unfounded included: the victim was using drugs or alcohol; the victim was `careless'; the victim failed to report the event immediately; the victim

did not have a medical examination; the victim was not severely injured; or the victim did not have a witness to corroborate her story (LeGrand, 1977). LaFree (1979) also found that cases were more likely to be classified as unfounded if the victim was young, black, single and from a lower income background. Given that this is the group most vulnerable to violent sexual attacks, the ramifications of this discretionary police designation were tremendous.

Political pressure apparently had some impact on the use of this category. LaFree (1979:143) noted that the rate of unfounded cases decreased as political pressure increased. The change, however, was illusory. Although fewer cases were officially listed as unfounded, more cases were filed as `open' or `inactive' and the number of arrests remained constant.

Prosecution decisions were also problematic because they were guided by the concern with `winning' a conviction (Vandervort, 1985; Marsh et al., 1982) rather than obtaining `justice'. As a result, the Crown was unlikely to pursue a difficult case. Factors which affected whether a case would be retained included: the presence of corroborating evidence, the social characteristics of the victim, and the extent the victim placed herself in a `vulnerable' situation (Minch et al., 1987:399). In addition, while rape cases were as likely to be dismissed or go to trial as other violent crimes, the outcome of these trials differed dramatically from other

violent crimes. Defendants in rape cases were less likely to be found guilty and were less likely to be sent to prison (Minch et al., 1987:401).

Clark and Lewis (1977:56) maintained that rape conviction rates were low in two ways. First, given the high attrition of cases at the police and prosecution level, the number of convictions represented only a tiny fraction of the rapes committed. Second, the rate was low compared to other criminal offences. For example, in 1971, the conviction rate for rape was 54.6% compared to a general conviction rate of 75% for all indictable offences (Clark and Lewis, 1977:56; Snider, 1985). Chappell (1984) claimed that the rates were not so dissimilar when compared to other serious crimes of violence. This was borne out somewhat by Minch et al.'s (1987:402) findings that 69% of the persons charged with sexual assault were eventually convicted of an offence compared to 76% of those charged with an indictable offence and 72% of those charged with a violent crime. The general conclusion was, however, that the conviction rate for rape was among the lowest of all violent crimes.

The final outcome of rape case processing also varied from other violent crime. Research revealed a wide variety of sentence types, ranging from suspended sentences and fines to imprisonment. One recurring finding was the disproportionate representation of probation as a final disposition (Gager and Schurr, 1976). Imprisonment was more

likely if the defendant was found guilty in a trial than if he pleaded guilty (LaFree, 1979). He was also more likely to receive a prison sentence in a jury trial than in a trial by judge alone. Conviction through plea bargaining was the least likely to result in a prison term (Marsh et al., 1982:33). Imprisonment was also more likely if the accused had a prior record (LaFree, 1979:49). Finally, the accused was less likely to receive an executed sentence (prison term) if the judge assigned any responsibility for the attack to the woman (LaFree, 1979:245).

The average sentence for rape in Canada was three to seven years imprisonment (Nadin-Davis, 1983). Fines, suspended sentences and prison terms only days long were found at the low end of the sentence range, while sentences as high as twelve or fourteen years were found at the high end (Boyle, 1984; Clark and Lewis, 1977; Nadin-Davis, 1983; Ruebsaat, 1985). Prison terms above seven or eight years were considered unusual (Boyle, 1984:174). Exceptions occurred if the defendant was considered `dangerous' or a large number of attackers was involved (Nadin-Davis, 1983).

2.3 PROBLEMATIC RULES OF LAW IN RAPE TRIALS

Feminists maintained that many of the problems associated with the processing of rape cases occurred because the law itself was biased. They argued that the rules of law governing the conduct of rape trials contributed to low

conviction rates because they were premised upon negative and stereotypical images of women, and unreasonable requirements for substantiating rape. Much of the controversy concerning rules of law in rape trials revolved around the issues of `consent' and `victim credibility'.

Although a victim's consent (or lack of consent) did not appear to be a major issue for other crimes, it was a key legal element in rape trials. While a lack of consent was assumed in ordinary assault, consent was presumed in rape trials (Snider, 1985). Thus the victim was required to prove not only that the event occurred, but also that she did not consent to it. The defendant, on the other hand, did not have to prove that the victim consented (Clark and Lewis, 1977). Not surprisingly, `consent' was the most common and successful defence used in rape trials (Bessmer, 1984; London Rape Crisis Centre, 1984). Because the defendant admitted his participation in the events, the legal debate shifted from the identity of the accused to whether a `rape' occurred at all (Bessmer, 1984:99). In order to prove a rape occurred, therefore, the means of verifying lack of consent was a critical issue.

Feminists argued, however, that the legal approaches to this issue reflected anti-female biases which resulted in unfair and contradictory treatment for victims. According to legal wisdom, the aggressive intent of the attacker could be inferred from the presence or absence of weapons, and the

excessive use of force. A second indicator of the lack of consent was evidence of resistance by the victim. That is, if the victim "resisted to the utmost" and sustained injuries in the process, then clearly she could not have granted her consent to the intercourse.

Feminists maintained that these criteria were problematic. They claimed that the most striking aspect of the resistance standard was that in both theory and practice the burden of proof was placed on the victim (Bessmer, 1984:179). They also maintained that because there was a strong belief by criminal justice personnel that resistance can be `faked' and that males are taught to be `aggressive', resistance and aggression were `devalued' as indicators of consent/nonconsent (Bessmer, 1984:243). In addition, the issue of mens rea (guilty mind) was controversial due to the Morgan ruling [1] which concluded that an accused can not be convicted if he truly believed that the victim consented, no matter how unreasonable that belief might have been. When the Supreme Court of Canada upheld this ruling in 1980 in Pappajohn v. The Queen,[2] it was vehemently attacked by feminists (Snider, 1985) as a license for men to commit rape with impunity because it meant that even with clear evidence of resistance by the victim or evidence of excessive force by the offender, an accused could still argue he had a true belief in consent.

Traditionally, judges have used other indicators to resolve the issue of consent. These included: immediate complaint by the victim, the previous sexual behavior of the complainant, the presence of contributory negligence by the complainant, the corroboration requirement and the judge's instruction to the jury (Bessmer, 1984:243). Each of these issues will be examined in the following section.

2.3.1 Corroboration and the Judge's Instruction to the Jury

The corroboration requirement was one controversial rule of law. Perjury, the Juvenile Delinquency Act, High treason and rape were the only situations in which the complainant's testimony alone was considered insufficient to obtain a conviction. For rape, other evidence, such as torn clothing, witnesses, or medical evidence of penetration, was also required (Snider, 1985; LeGrand, 1977; Clark and Lewis, 1977). This corroboration rule was accompanied by a cautionary instruction by the judge to the jury. This was based on a seventeenth century ruling by British Lord Chief Justice Matthew Hale (1778:635) that a rape is a charge "easily to be made and hard to prove, and harder to be defended." (LeGrand, 1977; Gager and Schurr, 1976). This caution to the jury and the corroboration requirement were justified by the argument that rape involved oath against oath and was, therefore, vulnerable to complainants `crying rape' (Bessmer, 1984). In addition, supporters of the rules claimed that they were

necessary to counterbalance the tendencies of judges and juries to be sympathetic toward rape victims (Bessmer, 1984; Goldsberry, 1979; LeGrand, 1977). These justifications were criticized for several reasons.

First, critics maintained that the rules were unnecessary because other safeguards protect the accused's rights. The burden of proof of guilt beyond a reasonable doubt is one such safeguard. Second, critics argued that other crimes were equally vulnerable to similar claims but did not have a corroboration requirement (Bessmer, 1984:108). Third, despite the predominance of the belief that women falsely accuse men of rape, there has been no research which has demonstrated this trend (LeGrand, 1977; Bessmer, 1984). Marsh et al.(1982) found that nearly one third of criminal justice officials felt rape reports were fabricated more than other crimes. Shame, blackmail, and revenge were all attributed as potential reasons for women to fabricate rape reports. Clark and Lewis (1977), however, found very few cases involved false charges of rape. In addition, given the expense and trauma of a trial, there were much easier ways to punish or blackmail a man (Bessmer, 1984). Fourth, there was a tendency for judges and juries to be disposed against victims rather than be overtly sympathetic as stated by proponents of the rules. Fifth, these rules were criticized because they worked against victims who submitted to threats rather than be injured (Bessmer, 1984:141). Finally, these rules "legitimized

certain stereotypes and myths" (Goldsberry, 1979:112) such as the belief that women `naturally' lie about rape (Bessmer, 1984:108).

Although corroboration was no longer formally required after 1976, the evidence indicated that without corroborating evidence it was unlikely that a rape case would reach court (London Rape Crisis Centre, 1984:33). Others have argued that an informal corroboration requirement existed even in the absence of a formal rule (Clark and Lewis, 1977:49; Bessmer, 1984:141).

2.3.2 Immediate Complaint

The common law rule of immediate complaint, that is, that the victim must report the rape to a third person at the earliest possible moment, also made conviction difficult (Canada: Department of Justice, 1983a). A time lapse between the occurrence of the rape and the reporting of the event was used to indicate that the woman was lying or consented to the intercourse (Snider, 1985:338; Canada, 1983a; LaFree, 1979; LeGrand, 1977). It was presumed that a `virtuous' woman would immediately report sexual victimization.

The belief that a `true victim' would immediately report her victimization is also riddled with contradictions. Victimization surveys have indicated repeatedly that rape frequently was not reported or that it was often years before the victim told anyone about the incident (Bessmer, 1984;

Canadian Urban Victimization Survey, 1985; Hall, 1985). Second, this belief failed to clarify what `nonvirtuous' victims would `naturally' do when raped. "Unless one assumes nonvirtuous women are never raped, this rule is based upon an assumption of the natural behavior of a sub-population of victims" (Bessmer, 1984:289). This belief has an inherent bias against women who lived alone and may have had difficulty finding someone in whom they could confide (Bessmer, 1984:296). Finally, there was a tendency for the rule to be manipulated according to the judge's disposition in particular cases. Thus a delay in reporting was attributed to the `shame' of an `innocent' victim, while the same delay was used as proof of deception by another. The rule, therefore, did not indicate anything other than the judge's disposition to believe or doubt the veracity of the victim (Bessmer, 1984:292).

2.3.3 The Victim's Sexual History

Another controversial rule of law in rape trials was the use of information concerning the victim's sexual history. Discussion of the victim's sexual experience was justified on the basis that it was indicative of consent and credibility (Marsh et al., 1982:80). There was a belief that because an `unchaste' woman no longer had to protect her virtue, she probably consented to other sexual encounters (Bessmer, 1984; Goldsberry, 1979; LeGrand, 1977). The victim's credibility

was linked to chastity through the belief that a `chaste' woman had no reason to lie about a rape.

In 1976, the rule was amended to limit questions about the victim's previous sexual experiences unless `required in the interests of justice' (Snider, 1985). This information was only allowed following written notification by the defence and following an in camera hearing to determine whether this information was relevant to the case. The admissibility of this evidence was dependent, therefore, upon the biases of court personnel, particularly the judge hearing the case. Even when this information was not allowed, the defence frequently attacked the victim's credibility through innuendo (Goldsberry, 1979:114).

Despite the intention to protect victims' privacy, these changes have been severely criticized in the feminist jurisprudence literature because these changes make the complainant a compellable witness at the voire dire hearing. This allows the defence to produce evidence concerning the victim's sexual conduct with someone other than the accused (Boyle et al., 1985:109) and, therefore, actually allows for an even greater invasion into the woman's privacy.

The more important unresolved issue is the relevance of a woman's sexual conduct in deciding a sexual assault case (Boyle et al., 1985). Feminists argue that a woman's previous sexual behavior has no relevance to specific cases of sexual violence. This argument is directly tied to demands to

eliminate spousal immunity and to allow a victim to charge a person with whom he/she is living with a sexual offence.

2.4 THE HISTORY OF THE LAW REFORM

In response to these concerns about rape laws and rape case processing, law reform had been introduced throughout most of the United States and Canada by the late 1970s and early 1980s. The 1975 Michigan Criminal Sexual Conduct law was a landmark reform which provided a model for many other reforms, including changes to the Canadian Criminal Code. It adopted four degrees of criminal sexual conduct reflecting the amount of force involved; extended the definition of rape from its narrow focus on penetration to include all forms of sexual interference; and altered a number of evidentiary rules such as the resistance and corroboration requirements (Gager and Schurr, 1976:200).

In Canada, the reform process, which followed a decade of rape law reform throughout the `common law world' (Chappell, 1984), grew from initiatives within the state bureaucracy (The Department of Justice) (Snider, 1985:343) as well as from political lobbying by feminists. Sexual offences had emerged as one area of special focus of the Law Reform Commission of Canada, which was formed in 1971 to review the Criminal Code in its entirety (Snider, 1985:337). In 1978, the Commission enumerated a number of recommendations for laws governing rape. In Report 10: Sexual Offences the Commission

suggested:

1)the creation of two distinct offences-- sexual interference (sexual contact unaccompanied by violence or threats) and sexual aggression (sexual interference accompanied by violence or threats) --which would redefine rape as a crime of violence rather than a crime of passion;

2)the elimination of penetration as a distinctive element; and

3)the abolition of a husband's immunity from prosecution.

Legislation to amend sexual offences, Bill C-52, was introduced into the House of Commons in May, 1978 by Justice Minister Ronald Basford. The National Action Committee on the Status of Women, Women and the Law and the Canadian Association of Sexual Assault Centres criticized the bill because it limited marital rape to non-cohabitating spouses and left the sexual assault offences proposed in the sexual morals section of the Criminal Code rather than under assault (Boyle, 1984:28). As a result of these criticisms, the bill died on the order paper (Snider, 1985:338).

New legislation, Bill C-53, was introduced by Justice Minister Jean Chrétien in January 1981. The bill was considered an improvement over Bill C-52 for several reasons. Rape and indecent assault were classified as assault and there were a number of changes in evidentiary matters, statutory rape and seduction offences (Boyle, 1984). A number of

issues, however, remained controversial. These included the retention of the subjective "belief in consent" defence; the scope of questions admissible concerning a complainant's sexual history (Boyle, 1984:29); and the proposals to repeal the offences buggery, bestiality and to reform the offence of gross indecency (Canada: Department of Justice, 1983a). In addition, some critics, such as Boyle (1984) and Chappell (1984), felt the semantic change from rape to sexual assault would obscure the seriousness of the offence because it would remove the moral connotations associated with rape. Following its second reading in the Commons in December, 1981, the bill was tabled and referred to committee.

During the three and one half months that the Standing Committee on Justice and Legal Affairs (3) held hearings, seven lobby organizations for women presented briefs including the National Association of Women and the Law, the National Action Committee on the Status of Women, and the Canadian Nurses Association. Seeking to increase conviction rates and make rape more similar to assault, these groups predominantly argued for: i)the expansion of the two-tier sexual assault category proposed in Bill C-53; ii)the inclusion of a summary offence category; and iii)milder penalties (Snider, 1985:343). The Attorneys-General of the provinces,[3] who sought to emphasize both violence and sexuality, called for special penalties for gang rape, for certain sexual practices, and for penetration (Snider, 1985:343). The Canadian Association of

Chiefs of Police, the second representative of the law enforcement community, wanted the law to be more `efficient' and `tougher' (Snider, 1985:344). Dissension existed among representatives for lawyers. The major issue for the Canadian Bar Association was to have sexual assault laws subsumed under modified assault laws. The Criminal Lawyers' Association, representing defence lawyers, condemned the bill as lacking conceptual clarity and "philosophically dangerous", and sought to improve defendants' legal rights and chances of acquittal rather than conviction (Snider, 1985:344).

Following these deliberations, Minister of Justice Jean Chrétien introduced a number of amendments on June 15, 1982. Three major changes were presented. First, he adopted the feminist recommendations to make simple sexual assault a hybrid offence which could result in either a summary or an indictable conviction. Second, he acceded to the women's groups and the Attorneys-General's recommendation to change certain evidentiary requirements which historically impeded successful convictions. Third, he increased the maximum penalties. Although he originally claimed that this reflected feminist desires to make rape more similar to assault, he later conceded that it was a concession to the law enforcement community's concern that the proposed legislation was `too liberal' (Snider, 1985:345).[4]

The resulting legislation, Bill C-127 (An Act to amend the Criminal Code in relation to sexual offences and other

offences against the person 1980-81-82-83 (Can.),c.125) was proclaimed law on August 4, 1982 and went into effect in January, 1983. Despite its protracted pre-history, Bill C-127 was passed at record speed and it was given all three Commons readings within a two hour period immediately prior to the end of session (Nadin-Davis, 1983:46).

2.5 CHANGES IN THE LAW

A number of changes were included in the new legislation. (See Figure 2.1 for a summary of these changes.) The most important changes included the following: the offences `rape' and `indecent assault' were eliminated and replaced with a three-tier classification of sexual assault designed to reflect varying degrees of violence or coercion. The new offences included simple sexual assault; sexual assault involving a weapon, threats to a third party or causing bodily harm; and aggravated sexual assault. Each tier was accompanied by new sentencing maxima. Simple sexual assault, designated a hybrid offence, provided the option of a summary conviction or a maximum of ten years in prison under an indictable charge. The other two tiers were assigned fourteen years in prison and life imprisonment respectively.

In addition, certain features, such as the use of a weapon, were changed from sentencing considerations to charging features (Nadin-Davis, 1983:29). This meant that the charge, rather than the sentence, would be determined by the

presence or absence of these factors. The requirement of penetration was also eliminated and all incidents of sexual interference included in the offence sexual assault. Another significant change was the elimination of spousal immunity, thus permitting a person to prosecute a spouse with whom she/he is living. In addition, definitions of sexual offences were changed to apply equally to both genders. In the past, most sexual offences were gender specific. For example, indecent assault differentiated between offences against males and offences against females. Rape could only be perpetuated by a male against a female. Bill C-127 outlined that sexual assault can be committed by either sex upon a person of either sex. As well, the new offences were included in Part VI of the Criminal Code "Offences Against the Person and Reputation" rather than Part IV "Sexual Offences, Public Morals and Disorderly Conduct". These changes were to emphasize the violence in rape rather than the sexual aspects of the crime (Canada: Department of Justice, 1983a:5).

Finally, in an attempt to eradicate the consequences of the myths associated with victim credibility, rules governing the conduct of sexual assault trials were also changed. The corroboration requirement, the caution to the jury, and the immediate complaint rule were all abrogated, while the criteria for admitting evidence concerning the victim's sexual history were limited to three circumstances. As well, the defence `honest belief in consent' was codified to accomodate the Pappajohn decision, thus permitting an accused to claim

FIGURE 2.1 SUMMARY OF CHANGES INCLUDED IN BILL C-127

RAPE	SEXUAL ASSAULT
Sexual penetration of a woman's vagina with a man's penis, without the woman's consent, outside of marriage. Forced sexual acts without penetration are not rape (Snider, 1985:338). (life)	`Assault' occurs where 1 person, without the consent of another person, applies force intentionally to that person. "Whether sexual assault is assault modified or a distinct, albeit related, concept is unclear" (Dawson, 1985:40). Includes behavior ranging from fondling to forcible intercourse (Nadin-Davis, 1983:33).
RELATED OFFENCES:	3 TIERS OF SEXUAL ASSAULT
Attempted Rape (10 years)	Simple Sexual Assault (summary: 6 months or fine) (indictable: 10 years)
Indecent Assault on a Female (5 years)	Sexual Assault with a weapon; involving third party threats; causing bodily harm; involving group ventures (14 years)
Indecent Assault on a Male (10 years)	
	Aggravated Sexual Assault sexual assault accompanied by wounding, maiming, disfiguring, or endangering the life of the complainant (life)
Part IV of the C.C.C. "Sexual offences, public morals and disorderly conduct"	Part VI of the C.C.C. "Offences against the person and reputation"
Offences gender specific	Offences `degenderized'
Spousal immunity	Spousal immunity abrogated
RULES OF LAW	
Corroboration rule	Not required
Warning to the jury	Not allowed
Immediate complaint	Not required
Victim's sexual history with someone other than the accused "if necessary"	Discussion of victim's sexual history limited to three criteria
mistake of fact	mistake of fact codified

he honestly believed that the victim consented despite evidence to the contrary. The trial judge must, however, direct the jury to consider the presence or absence of reasonable grounds for a belief in consent.

2.6 EVALUATIONS OF THE IMPACT OF THE REFORM

The new legislation contained six general areas: assault; sexual assault; conduct of sexual assault trials; degenderization of offences, child abduction; and consequential amendments. The most significant changes included the elimination of rape and indecent assault, the creation of a three tier classification scheme for assault and sexual assault, and the elimination of many of the rules of law governing rape trials which had been so problematic. According to the Department of Justice (Canada, 1983a), the major objective of these reforms was to define rape as a crime of violence and coercion rather than as a crime of passion. Researchers analyzing the impact of the reform, such as Snider (198), Nadin-Davis (1983) and Caringella-MacDonald (1988), also identified the following objectives of the reform:

1) to diminish the high rates of attrition in rape case processing and increase the reporting rates, arrest rates, prosecution rates, and conviction rates;

2) to provide greater access to the criminal justice system by victims and provide greater protection to victims by extending equal protection to all groups;

3) to make the treatment of rape more comparable to other crimes (Caringella-MacDonald, 1988:128).

Evaluations in both Canada and the United States have attempted to examine the success of reform in meeting these objectives. These evaluations generally consist of pre and post reform comparisons which can be measured by such criteria as the rates of reporting, unfounding, and convictions (Marsh et al., 1982:43). The findings have been mixed. For example, Renner and Sahjpaul (1986) found significant increases in the rates of reporting since 1983. Marsh et al.(1982) found slight increases in the incidents of reporting and arrest rates but unfounding rates remained stable. In addition, they found an increase in conviction rates but Polk (1985) found only a very slight increase. Loh (1981) found no change in the overall number of convictions, although there was an increased number of convictions for more serious offences and a decrease for less serious ones.

Other research indicates that many of the problematic rules of law continue to influence trial outcomes. For example, Caringella-MacDonald (1988:131) and Bessmer (1984) argue that the corroboration requirement continues to function in a <u>defacto</u> manner although Marsh et al. (1982) found that there is a change in the priority assigned to it. That is, although a corroboration requirement continues informally, it is not given as much importance by criminal justice personnel as it was in the past. Likewise, the priority of the victim's

sexual history has decreased (Marsh et al, 1982:50) but the belief that `consent once means consent always' has persisted (Caringella-MacDonald, 1988:132). Furthermore, consent remained a unique aspect of sexual assault cases (Caringella-MacDonald, 1988:131) while `consent tests' continue to reflect stereotypes about women (Chappell, 1984; Marsh et al., 1982). Despite these problems, both Caringella-MacDonald (1988) and Marsh et al. (1982) concluded that the victim's experience has generally improved.

CHAPTER 2 NOTES:

1.Morgan v. D.P.P. [1 Cr. Appeal Reports 136 (1975)]
The trial judge ruled that the `mistake of fact to consent' defence could be used only if there were reasonable grounds to believe in that consent. The Court of Appeal upheld the conviction but ruled that mistake of fact is a defence, whether or not it is based upon reasonable grounds, so long as it was honestly held (National Association of Women and the Law, 1981:26).

2.Pappajohn v. The Queen (1980) 52 C.C.C. (2d) 481 (S.C.C.)
Although Pappajohn lost his case, the Supreme Court of Canada held that an honest mistake of fact to consent is a defence whether there are reasonable grounds for that belief or not, but made it clear that the defence is permitted only in circumstances where there is evidence to support such a belief. It is interesting to note that in the circumstances of the case, Pappajohn bound the victim to the bedposts, yet he still claimed that she consented to the intercourse.

3.The Attorneys-General were represented by the chief prosecutors of nine of ten provinces.

4.This negotiation, which occurred in private meetings with senior law enforcement personnel prior to the public hearings (Snider, 1985:345), illustrates not only the back door bargaining which occurs in government reform, but also the danger of contradictions in political and theoretical goals being incorporated by the power holders in a way not intended by the groups seeking reform. Feminists must decide whether our laws can provide the forum for equality or to what extent and at what cost.

CHAPTER 3: METHODOLOGICAL CONSIDERATIONS

3.1 METHODOLOGY

To study the impact of rape reform on judicial decision-making, a content analysis of judges' remarks at sentencing was conducted. Content analysis is a useful method for this study for a number of reasons. First, content analysis allows one to make inferences about the sender of a message, the message itself, or the audience of the message by systematically identifying characteristics of the communication and demonstrating how these characteristics are related to the inferences (Carney, 1972:xv). With a content analysis methodology, therefore, one can systematically examine judges' communications and thereby make inferences about the decision-making process.

Second, a content analysis is applicable to comparative and longitudinal research. Interviews and questionnaires are frequently problematic in longitudinal research due to problems of obtaining an adequate sample and memory distortion by respondents. Content analysis, on the other hand, is an unobtrusive method which can be applied to any form of communication (Babbie, 1979), including: documents, literature, film, and recorded conversations. Consequently, a researcher doing a content analysis can examine past history and/or make comparisons over time (Babbie, 1979; Weber, 1985).

For the purpose of this study, there are a number of written court documents available which extend across the

relevant time period under consideration, including: trial transcripts, judgments, and sentencing trial transcripts. However, because these forms of communication are difficult to obtain and are very lengthy, they are not used in this study. Judges' remarks at sentencing, on the other hand, provide an excellent data base. They are relatively short, uninterrupted summaries by judges about the nature of the sexual attacks and society's response to such offences. From these communication forms, we can make inferences about judges' attitudes and beliefs about sexual violence. Finally, because they are accessible to other researchers, they are amenable to reliability and validity checks.

A third advantage of a content analysis is that it is adaptable to both quantitative and qualitative analysis. Much of the literature on the impact of rape reform has involved quantitative research which identifies the variables involved in judicial decision-making and the frequency of their utilization (See for example: LaFree, 1979). The qualitative research which exists has predominantly been anecdotal (for example: Brown, 1988; Marshall, 1988). This research is, therefore, vulnerable to criticisms that their findings may not be representative of the general behavior of judges. Holsti (1969) and Babbie (1979) state that in a content analysis, quantitative and qualitative findings should complement each other.

Whether the findings will be quantitative, qualitative or both depends, to some extent, upon the units of analysis used in the study. The five types of units of analysis used in content analysis include: words, themes, characters (for example, literary characters), items (for example, news stories, tv shows), and time and space measures (for example, the number of pages, inches dedicated to one discussion) (Kerlinger, 1973). Quantitative analyses tend to focus on the `manifest content', that is, the physical characteristics of the text such as the frequency of certain words or the amount of space used for a discussion. These analyses tend to be reliable because they depend on precise definitions for measuring concepts but are problematic in terms of validity (Babbie, 1979:240). Measures of frequency or space, for example, are easily calculated but the theoretical relevance of the categories may be questionable. Qualitative analyses, on the other hand, focus on the `latent content', that is, they attempt to tap the meaning of the communication. Although qualitative analyses have greater validity, they lack reliability and specificity (Babbie, 1979:240).

In both types of analyses, problems of reliability and validity usually result from ambiguity in the coding rules or in category definitions (Weber, 1985:15). It is critical, therefore, that categories be clearly defined (Holsti, 1969:95) and the rules for identifying category units consistently followed. To guarantee validity, categories

should also have theoretical relevance (Holsti, 1969).

This study relies upon themes as the units of analysis. Although thematic content analysis is less precise than other forms of content analysis, it allows for more "detailed, sophisticated and useful comparisons concerning values and attitudes" (Holsti, 1969:116). These comparisons should identify areas which can then be subjected to a more precise quantitative analysis (Weber, 1985:3). The themes examined in this study are derived from the findings of previous research which has identified variables used by judges to determine the seriousness of sexual attacks. (See Operationalization below for further detail.) The use of categories similar to those used by other researchers (for example: Marshall, 1988) lends support to the validity of the concepts. Furthermore, the categories are carefully operationalized so that future research may attempt to replicate these findings.[1]

3.2 DATA SOURCES

Since most criminal court cases are never transcribed, obtaining a random sample of cases was impossible. Cases which are appealed, however, are usually transcribed, at least in part. The data base for this study, therefore, consists of all the cases of sexual offences in the province of Saskatchewan which have been appealed to the Saskatchewan Court of Appeal from 1975 to 1988. This time range

encompasses both rape law before 1983 and sexual assault legislation after 1983, and reflects the dates for which transcripts are accessible.

Because the Courts do not maintain a list of cases by offence, alternative sources were used to locate cases. The population of sexual offences appealed in Saskatchewan from 1975 to 1988 was obtained through a number of sources. The most important was Saskatchewan Decisions which maintains a comprehensive list of all cases appealed in Saskatchewan from 1975 to the present. The research was supplemented by references to Saskatchewan Reports and the Canadian Sentencing Digest. In this way, sixty-eight cases involving sexual offences were identified. To the best of my knowledge, this represents the population of cases related to sexual offences reviewed by the Court of Appeal for Saskatchewan from 1975 to 1988.

In this research, a `case' refers to each case appealed to the Court of Appeal for Saskatchewan. A case may include: one or more offenders involved in a single incident; one or more victims in a single incident; a number of attacks by a single offender. In each of these possible scenarios, only one `decision' resulting in a specific sentence per offender is given out.

Although the typical case involved one victim, one offender and one sentence, there were some anomalies. One anomaly involved Regina versus G.B. et al. which was treated

as three separate cases (R v. G.B.; R v. G.B., A.B., and C.S.; and R. v. G.B. et al.). Although the cases were heard at the same time and place before the same judge, they were legally distinct trials and decisions. Another case involved a `dangerous offender' disposition,[2] but because it concerned a dangerous sexual offender, it was included in the study. Two cases (R. v. Tillotson; R. v. Skiftun) were dismissed at the Court of Appeal level, but because the data pertaining to them remains in the Court of Appeal archives, they have been included in this study.

Two cases were omitted from the study. The first was omitted because no data were available from the Court of Appeal. The second case involved a sexual offence in the original trial but there was no information concerning this trial. The only material available at the Court of Appeal was the extradition hearing of the offender which was not relevant to this study. In total, this study is based on sixty-six cases. A list of the names and dates of these cases is provided in the List of Tables (Appendix A).

Once each case was identified, the "context units", that is the portion of communication which was actually to be analyzed, could be obtained. These context units consisted of judges' remarks at sentencing at the original trial and the judgements of the Court of Appeal. For the purposes of this study, each of these context units will be referred to as a `transcript'. Each `case' may contain one or more

`transcript' (the lower court statements, the Court of Appeal statements, etc.). A transcript only refers to the judge's sentencing remarks. Discussions prior to sentencing and discourse with lawyers or offenders during sentencing are excluded from the context units.

The boundaries of the transcripts were determined by a number of criteria. The remarks at sentencing are usually preceded by the lawyers' summations or comments by the accused. Sentencing frequently begins with statements by the judge such as "Stand up, please" or "You have been charged with ...".

Ideally, there should have been two transcripts per case (one from the original trial and one from the Court of Appeal judgement). However, 24 transcripts were not available at the Queen's Bench level. The reasons these transcripts were not available included:

-the transcripts were lost in the mail;

-the tape recorders were inoperative at the trial;

-the tapes had been destroyed;

-the transcripts were available only through the court reporter present at the trial. Since tape recorders have replaced court reporters, obtaining these transcripts is improbable;

-the case involved a Young Offender and access to the information was prohibited.

For each case in which the transcript was not available in the Court of Appeal files, letters were sent to the Registrar of the Court where the trial occurred. This procedure did not yield any additional transcripts because the transcripts were not available at these sources. Court of Appeal transcripts were not available either because the file had been lost or because the appeal had been abandoned and no transcript had been filed with the Court of Appeal.

The distribution of transcripts was also affected because some `cases' contained more than one transcript at the same level of court. For example, in one case, one of the co-accused had to be sentenced by a different judge on a different day when he failed to appear in Court for his sentencing trial. As a result, there are two transcripts available for this case. In other cases, additional transcripts were generated at the Court of Appeal level when one of the judges dissented with the findings of the majority, or if a judge wished to make comments in addition to the ones made in the judgement of the majority. As mentioned earlier (R. v. G.B. et al), two transcripts involved three legally distinct cases, even though all three cases were heard at the same time. For the purpose of this study, each section of the Court of Appeal judgment was treated as a separate case and separate transcript. The second judgment, which made additional comments, discussed issues relevant to the latter two cases. The transcript was divided, therefore, into two

transcripts to reflect the case in which the issue was originally discussed.

In total, 109 transcripts were obtained. This included 42 transcripts at the Queen's Bench and Provincial Court level and 67 transcripts from the Court of Appeal. The distribution of transcripts is listed in Table 3.2.1.

TABLE 3.2.1: DISTRIBUTION OF TRANSCRIPTS

	Queen's Bench*	Court of Appeal
available	42	67
unable to obtain	15	0
missing	2	2
no remarks-acquittal	5	**

* refers to Provincial, District and Queen's Bench judgments
** not relevant

There were 55 judges represented within these 109 transcripts. Of these, 43 different judges were identified at the `Queen's Bench' level and 12 judges were identified at the Court of Appeal level. The identity of the judge was not listed in one additional trial transcript.

3.3 OPERATIONALIZATION

Each transcript was systematically analyzed for the presence or absence of specific themes. When there was no reference to the theme, the transcript was categorized as `not mentioned', while transcripts which contained references to the theme were categorized as `mentioned'. Every reference pertaining to the specific theme was recorded and then divided into relevant subcategories.

The themes examined reflect variables which have been identified as influential mitigating and aggravating factors [3] in judicial decision-making concerning sexual violence (See Figure 3.1). These variables include characteristics of the accused, the victim and the offence. The findings of Boyle (1984), Nadin-Davis (1983), and LaFree (1979) indicate that sexual assault and rape will be defined as more serious if:

a) the act is accompanied by the threat or use of force;

b) penile-vaginal penetration occurs;

c) some form of `abnormal' or `indecent' sexual behavior, including anal or oral penetration, is involved;

d) more than one assailant is involved;

e) the victim is very young or very old;

f) no previous relationship between the victim and offender exists;

g) the victim is male;

h) the victim was not engaging in behavior that could be construed as `contributory negligence';

i) the offender is considered dangerous or is a repeat offender.

Because much of the data concerning these variables are not consistently available in sentencing remarks, only a few of these variables are examined in this study. Each variable is measured by analyzing the absence or presence of references to these variables or `themes'. The themes investigated

FIGURE 3.1: VARIABLES WHICH INFLUENCE THE OUTCOME OF RAPE /SEXUAL ASSAULT CASE PROCESSING

I. VICTIM CHARACTERISTICS
- Age
- Gender
- Race
- SES
- Lifestyle: especially factors which might be considered as contributory:
  - living alone; living with father/husband
  - out late at nights
  - alcohol or drug use
  - sexual history
- Relationship with offender
  - married/common law
  - separated/divorced
  - breach of trust-- parent, custodian, authority figure
  - friend/acquaintance/lover
  - family member
  - stranger
- Injury
  - physical
  - psychological
- Demeanour in Court

II. OFFENDER CHARACTERISTICS
- Previous criminal record
- Plea guilt or trial
- Age
- Race
- SES
- Mental health: mentally ill; handicapped; psychotic
- Leader in joint ventures
- Motive
- Reputation in community
- Alcohol or drug use

III. OFFENCE CHARACTERISTICS
- Type of sexual interference
  - penile-vaginal penetration
  - indecent or unusual acts, including anal and oral penetration
  - touching genitalia vs secondary sexual characteristics
- Violence
  - use of, or threat to use a weapon
  - evidence of victim resistance
  - threat to third parties
  - wounding/maiming/disfiguring
- Number of attackers involved
- Length of time victim confined &/or restrained

included: `violence', `coercion', `physical impact on victim, `psychological impact on victim', `penetration as a form of sexual interference', `breach of trust', `criminal behavior of the accused', `sexuality' and `alcohol or drug consumption by the accused'. Each of these themes was operationalized and measured in the following way:

3.3.1 Violence:

Each transcript was analyzed for the absence or presence of statements concerning violence in the offence. The presence of this theme was indicated by all judicial references to `violence', including statements that the assault was `violent' or `non-violent'. Other measures indicating the presence of violence were more problematic because judges recognized the presence of violence in a number of ways without specific reference to the word "violence". For example, although they made no direct reference to the word "violence", judges might acknowledge violence through the detailed descriptions of the assault.

In addition, transcripts which contained orders under Section 98 of the Criminal Code were included as statements indicating the presence of violence. This section, which orders the accused to surrender all firearms for a specified time period, is to be instigated whenever an offence involves the use of a weapon or involves violence. In implementing this provision, judges implicitly recognized the presence of violence.

3.3.2 Coercion:

Although the application of force has been established according to the law before the sentencing stage, judges distinguished between violence and coercion. `Violence' refers to a description of the overall event, including how the event was perpetrated and its impact on the victim. `Coercion' is a specific form of violence involving the use of force or threats to compel a person to act against his/her will (i.e. intimidation).

Coercion was measured by statements by judges concerning the presence or absence of coercion. In addition, statements concerning the use of weapons, threats, or some other form of pressure to force the victim to comply with the demands of the offender were used as indicators of coercion.

3.3.3 Physical Impact:

Each transcript was analyzed for the absence or presence of statements concerning the physical impact of the assault on the victim. Statements by judges indicating the degree of physical injury, ranging from no injury to life threatening injuries, were encompassed within this category.

3.3.4 Psychological Impact:

Each transcript was analyzed for the absence or presence of statements concerning the psychological impact of the attack on the victim. Indicators of this theme included all

references to the psychological or emotional consequences of the offence for the victim which were not identified as physical consequences. This included references to long-term psychological impact and emotions such as `anger' or `fear'.

3.3.5 Breach Of Trust:

Each transcript was scrutinized for the presence or absence of statements concerning the involvement of a breach of trust in the assault. `Breach of trust' generally refers to the misuse of power conferred upon a person to fulfil a particular role. In crimes against the person, it is often associated with the abuse of parental or authority relations. In this study, a wider conceptualization is used to include all the ways in which `trust' may be exploited. Breach of trust relations can be differentiated from assaults which involved sudden attacks by strangers with whom the victim has had no prior association. Rather, breach of trust refers to situations in which the victim had previous relations with the accused, either familial, friendship, or authoritarian, and had no reason to fear or distrust the offender.

Indicators of the presence of this theme in transcripts included judicial statements about: mistrust, a breach of trust, references to the special status the accused had in comparison to the victim (for example, references to a parental role or a position of trust), and references to the exploitation of the victim's trust or vulnerability.

Probation orders dictating that the offender have limited or no access to the victim (or to other people with similar characteristics in similar circumstances) were also used to indicate the presence of the category breach of trust. Transcripts which did not contain these statements about `breach of trust' were subdivided into two categories. These categories differentiated between cases in which there was some form of previous relationship between the offender and victim and those which involved assaults by strangers.

3.3.6 Penetration:

Each transcript was examined for the presence or absence of statements concerning the type(s) of sexual acts involved in the assault. Judicial statements about the type of sexual interference, in particular references to penile-vaginal penetration, were used as indicators in this category.

3.3.7 Accused's Criminal History:

Each transcript was analyzed for the presence or absence of judicial statements about the offenders' previous involvement or propensity for further involvement in crime. Indicators of this theme included: statements about the offender's criminal record, his previous involvement in crime, and the probability that he will commit crimes in the future.

3.3.8 Alcohol And Drug Abuse:

Each transcript was analyzed for the presence or absence of judicial statements concerning the role of alcohol or narcotic use by the accused in the assault. Indicators of the presence of this theme included statements referring to the accused's use of alcohol or drugs.

3.3.9 Accused's Control Over His Sexual Drives:

Each transcript was analyzed for the presence or absence of judicial statements about the role of the accused's sexual behavior in explaining the assault. This theme included references to: the presence of sexual deviancy or mental illness, uncontrolled passion, duress in the accused's life, societal expectations, or victim provocation.

The following chapter examines the results produced using this content analysis format. Distribution charts present the absence or presence of each thematic category, as well as the relevant subcategories which emerged.[4] Due to the small sample size, tests of statistical significance are not presented. The analysis presents, therefore, general trends in judicial responses to sexual violence. The analysis of each theme concludes with a discussion of the implications of these trends for judicial decision-making.

3.4 LIMITATIONS OF THE DATA

Although this study is based upon the population of sexual offences cases which were appealed to the Court of Appeal for Saskatchewan from 1975 to 1988, the research is limited to a small number of cases. The findings, therefore, are specific to Saskatchewan and cannot be generalized to the treatment of sexual offences elsewhere in Canada. In addition, because the study relies on cases which have been appealed,[5] it is possible that these cases are not representative of cases which were not appealed.

With a larger sample, a comparison of the decisions at the lower court level and the Court of Appeal level could be very interesting. Given the small number of cases, however, such a comparison was not conducted here. Rather, each `transcript' was treated individually and represented the comments of different judges, even though there was an overlap in cases.

The study is also limited by the assumptions which are implicit in the presentation of the data. For the purpose of this study, it was assumed that the presence of references to a theme indicated that the theme was considered significant by the judge(s) and that the absence of any references indicated that the theme was considered insignificant. Judges might have discussed these aspects elsewhere in the trial and considered them self-evident at the time of sentencing. In addition, no attempt was made to distinguish whether the

appeal was on sentencing, conviction, or involved a Charter application (For example, R. v. Clarke; R. v. Rogers and Thurber). As a result, certain transcripts were less useful than others.

However, even with this limitation, clear trends are evident in judicial references to these themes. In addition, it is possible that an analysis of other forms of judicial communication, such as trial transcripts, judgments or correspondence between the trial judge and the Court of Appeal, would establish even clearer trends.[6] Moreover, it is important to recognize that at the point of making the sentencing remarks, the judge has already accepted, to some degree, the veracity of the victim and the culpability of the accused. It is possible, therefore, that the statements represented in this study are milder or less extreme than the statements concerning these issues which are made elsewhere during the trial.

Finally, because the research was conducted by only one person, no measure of reliability has been provided. Ideally, a reliability check (for example, by another person) should be conducted. Due to limited resources, however, an analysis of reliability was not possible. To control for reliability errors, I attempted to operationalize terms carefully and with specific identifying characteristics[7] wherever possible. Secondly, I have provided a list of the cases analyzed so that other researchers may duplicate the study.

CHAPTER 3 NOTES:

1.The classification of the data by a second person would have been useful and an important test of reliability. Reliability and validity checks were not possible, however, due to limited resources. As a result, special care was taken to operationalize each theme and to systematically apply the coding rules.

2.The label of `dangerous offender' is applied when an offender engages in a number of serious crimes and is considered a significant threat to society. Under this designation, the offender can be given an `indeterminant sentence'; that is, the length of the sentence is not specified and is ultimately determined by predictions of whether he/she remains dangerous.

3.Aggravating factors refer to anything which makes the crime more serious and results in a greater sentence. Mitigating factors refer to extenuating circumstances which the judge uses to determine that the sentence should be less severe.

4.These categories reflect the `common denominator' of the data; that is, they are mutually exclusive and exhaustive. Each of the transcripts, therefore, is represented one time for each category. As a result, a great deal of interesting information, which was not easily categorized, is subsumed within these general categories. A larger sample and an analysis of a single theme would be more appropriate for systematically analyzing the nuances of this additional information.

5.Most cases remain in the possession of the Court Reporter present at the trial. The records are not transcribed unless specifically required. The difficulties in obtaining these records were compounded by the fact that in most jurisdictions, tape recorders have replaced the Court Reporters who kept the files. Therefore, many transcripts would only be available through the Court Reporter who is no longer accessible. The taped transcripts could have been useful but did not extend back to the time period under consideration in this study. However, cases which are appealed are generally transcribed, at least in part. Due to the extreme cost of producing entire transcripts, many of the Court of Appeal files contained only those sections relevant to the appeal. Since many cases involve an appeal on sentence, judges' remarks at sentencing are frequently produced even when the whole transcript is not available.

6.Although there was no systematic analysis of these alternative data forms, an informal sample suggested that trends discussed in this study are also evident in these other materials. More importantly, the informal review of these materials suggested that judges are much more careful about what they say in open court than what they say in private (for example, through `interdepartmental' correspondence). This suggests, therefore, that the findings contained in this study may underestimate the extent of problematic judicial definitions.

7.For example, references to Section 98 of the Criminal Code were clearly operationalized to be defined as references to `violence'.

CHAPTER 4: ANALYSIS OF FINDINGS

4.1 INTRODUCTION

This chapter examines judicial definitions of sexual violence and the impact the legislative reform had on these definitions. Distribution charts present the absence or presence of judicial references to each thematic category, as well as the relevant subcategories which emerged. In addition, the implications of the findings for judicial decision-making and the impact of the reform are discussed.

These findings are based on a content analysis of 109 `remarks at sentencing transcripts' from 66 sexual offences `cases' which were appealed to the Court of Appeal for Saskatchewan from 1975 to 1988. These cases included 80 `offenders', all of whom were male, and 86 `victims', 76 of whom were female. Throughout the following discussion, the terms "offender", "accused", and "perpetrator" will be used interchangeably. The pronoun "he" is also used to indicate the offender. The term "victim" will refer to the person on whom the offence was committed. In discussions which describe situations which only pertain to female victims, the pronoun "she" may be used interchangeably with "victim".

4.2 VIOLENCE

A key debate in the reform initiative involved attempts to redefine rape as a crime of violence rather than as a crime

of passion or morality. To accommodate this definition two major changes were implemented in Bill C-127. The first involved the inclusion of the new sexual offences in Part VI of the Criminal Code "Offences Against the Person and Reputation" rather than in Part IV "Sexual Offences, Public Morals, and Disorderly Conduct". The second, more substantive change involved the creation of a three tier classification of `sexual assault' designed to reflect varying degrees of violence or coercion. Given the importance of this debate, it is important to examine how judges define violence in sexual offences and to investigate whether there has been a change in such judicial definitions since the implementation of the new offences.

Each transcript was examined for the presence or absence of judicial statements about `violence' in the offence. The presence of this theme was indicated by all judicial references to `violence', including statements that the assault was `violent' or `non-violent', and orders under Section 98 of the Criminal Code (For further discussion of the operationalization of the theme, see Chapter 3.).

Using these indicators, 64 transcripts (58.7%) contained no references to the theme `violence' and were categorized as `not mentioned'. The 45 transcripts (41.3%) which contained references to violence were categorized as `mentioned'.

TABLE 4.2.1: ABSENCE/PRESENCE OF REFERENCES TO `VIOLENCE'

	F	%
not mentioned	64	58.7
mentioned	45	41.3
	---	----
	109	100%

Transcripts which contained references to `violence' were further divided into categories indicating either the absence (`non-violent') or presence (`violent') of `violence' in the assault. A third category (`contradiction') represented transcripts in which the judge defined the offence as `non-violent', yet ordered the accused to comply with the provisions of Section 98 of the Criminal Code. Because Section 98 had been set out as an indicator of `violence', this constituted a contradiction in the judicial definition of the presence or absence of `violence' in the offence. The distribution of these categories has been summarized in Table 4.2.2.

TABLE 4.2.2: DISTRIBUTION OF STATEMENTS IN WHICH VIOLENCE `MENTIONED'

n=45

	F	%
violent	29	64.4
non-violent	12	26.7
contradiction	4	8.9
	--	----
	45	100%

In the transcripts which mentioned `violence', the offence was classified as `violent' in 64.4% of the transcripts and as `non-violent' in 26.7% of the transcripts. The offence was classified as both `violent' and `non-violent'

(`contradiction') in 8.9% of these transcripts.

TABLE 4.2.3: `VIOLENCE' BY DATE

	1975-1982		1983-1988	
	F	%	F	%
NOT MENTIONED	24	64.9	40	55.6
MENTIONED	13	35.1	32	44.4
	37	100%	72	100%
(mentioned by date)				
violent	10	27.0	19	26.4
non-violent	3	8.1	9	12.5
contradiction	0	0.0	4	5.5
	13	35.1%	32	44.4%

The percentage of transcripts in which `violence' is `mentioned' increased from 35.1% before 1983 to 44.4% after 1983. The resulting 9.3% increase in transcripts in which `violence' is `mentioned', however, has not resulted in the labelling of more offences as violent. Rather, the number of `non-violent' cases increased from 8.1% before 1983 to 12.5% after 1983 and the number of `contradictory' cases increased from 0.0% before 1983 to 5.5% after 1983. The number of `violent' cases decreased from 27.0% before 1983 to 26.4% after 1983.

These findings suggest that judges have attempted to include the three tier classification of sexual assault in their decision-making. Judges may be more inclined to delineate the degree of violence involved in the offence in order to justify the sentence according to this

classification. This is a positive outcome of the reform. However, while the law has delineated varying degrees of violence, judges continue to delineate the absence or presence of violence. This distinction presupposes that a sexual offence can occur without violence. It may also underestimate the seriousness of less violent cases and it decreases the seriousness by which all other cases are evaluated. This is contrary to the reform's goal of defining sexual aggression as inherently violent. In addition, it raises serious questions as to how judges determine what constitutes a violent assault and what does not.

Judges used a number of variables to evaluate whether an offence was `violent' or `non-violent'. One indicator was the presence or absence of physical and/or psychological injury. Although the absence of injury was generally considered indicative of an absence of `violence', judges occasionally recognized that an absence of injury did not negate the presence of `violence' in the attack. Judges also determined the absence or presence of `violence' by the type of sexual interference involved, including whether it involved coercion, penetration, brutality, or confinement of the victim. The characteristics of the offender were also considered important in determining whether an offence should be defined as `violent'. In addition, the victim's behavior, such as whether or not she resisted, were important for the judges'

decision to define the assault as violent. When the victim's behavior was used to determine if the assault was `violent' or `non-violent', judges occasionally reflected misconceptions about women and their response to sexual victimization. For example, judges occasionally focused on the victim's behavior following the offence instead of relying on cues which would normally be used to indicate the presence of violence. The absence of an immediate complaint, for example, may be used as an indicator that an offence was `non-violent', despite the presence of coercion, the use of weapons and the presence of injuries in the offence.

Using these indicators to determine the presence or absence of `violence' is problematic because they are dependent upon the social definitions assigned to them by judges who are, in turn, influenced by myths and misconceptions about women and sexual violence. The following discussions will examine in greater detail the ways in which judges define selected indicators and the implications of these definitions. It will be argued that the indicators judges use to determine the degree of violence and seriousness of an offence are heavily influenced by the assumptions judges make about the nature of sexual violence, about `appropriate' female behavior, and about gender relations more generally. The indicators which will be examined include judicial definitions of coercion; breach of trust; the impact

of the assault on the victim, including both physical and psychological impact; the importance of penile-vaginal penetration; and characteristics of the offender, including the accused's propensity to commit crime, the accused's use of alcohol or drugs, and the accused's control over his sexual drive.

4.3 COERCION

One of the most important features of the new offence `sexual assault' was its three tier classification scheme which was designed to incorporate increasing degrees of coercion as a `charging factor'. This classification would be used to determine the level of sexual assault the accused would be charged with according to the degree of coercion involved in the offence. The presence of weapons, threats to the victim or a third person, injury, or more than one attacker were specified as charging factors in this classification.

Given the importance of this classification scheme, each transcript was examined for the presence or absence of statements concerning the use of coercion to commit the assault. Indicators of the theme coercion included: statements concerning the absence or presence of `coercion'; statements concerning the use of weapons, threats, or some form of pressure to force the victim to comply with the demands of the offender.

Using these indicators, 66 transcripts (60.6%) contained no references to `coercion' and were classified as `not mentioned'. The remaining 43 transcripts (39.4%) contained references to `coercion' and were classified as `mentioned'.

TABLE 4.3.1 ABSENCE/PRESENCE OF REFERENCES TO `COERCION'

	F	%
not mentioned	66	60.6
mentioned	43	39.4
	109	100%

Transcripts which `mentioned' `coercion' were further divided into 3 categories which reflect the absence or presence of consent and force. The first category, `no force: consent', referred to offences in which there was no force involved because the victim consented to the intercourse. These transcripts referred to offences which involved sexual intercourse with a person under 14 years of age. The second category, `no force: no consent', referred to offences in which the victim did not consent to the intercourse but no `force' was used in the sexual acts. This category included situations in which: the victim simply "did not know what to do", there was no actual physical contact involved (for example, the offence involved `flashing'), or there were only brief, non-violent forms of physical contact involved (for example, the offence involved `fondling'). The third

category, `force: no consent', referred to offences in which the victim did not consent to the intercourse and `force' was used in the offence. Transcripts which stated there was `force' involved in the offence frequently referred to the type(s) of force involved. For example, judges referred to the presence and use of weapons, threats, physical force and restraint, and gang rapes as types of force used in the offences. Each offence may have contained one or more of these forms of `coercion' or `force'. The distribution of transcripts into these 3 categories is presented in Table 4.3.2 .

TABLE 4.3.2: DISTRIBUTION OF TRANSCRIPTS IN WHICH COERCION `MENTIONED'

n=43

	F	%
no force: consent	5	11.6
no force: no consent	6	14.0
force: no consent	32	74.4
	--	----
	43	100%

In the transcripts which mentioned `coercion', 74.4% stated that the offence involved force and no consent (`force: no consent'); 14% stated that there was no force but no consent (`no force: no consent'); and 11.6% stated that there was no force because consent was given (`no force: consent').

TABLE 4.3.3: `COERCION' BY DATE

	1975-1982 F	1975-1982 %	1983-1988 F	1983-1988 %
NOT MENTIONED	21	56.8	45	62.5
MENTIONED	16	43.2	27	37.5
	37	100%	72	100%
(mentioned by date)				
no force; consent	1	2.7	4	5.6
no force; no consent	1	2.7	5	6.9
force; no consent	14	37.8	18	25.0
	16	43.2%	27	37.5%

The number of transcripts in which `coercion' is `mentioned' decreased from 43.2% before 1983 to 37.5% after 1983. Transcripts indicating `no force; consent' increased from 2.7% before 1983 to 5.6% after 1983; transcripts indicating `no force; no consent' increased from 2.7% before 1983 to 6.9% after 1983; and transcripts indicating `force; no consent' decreased from 37.8% before 1983 to 25% after 1983.

These findings suggest that since 1983 judges are considering the presence of coercion less frequently in their sentencing decisions! It is possible that because the degree of coercion involved in the offence is now a `charging factor', judges are no longer specifying the presence of coercion in their sentencing decisions. This interpretation is contradicted, however, by the fact that there has been a 7.1% increase in references to the `absence' of force and a 12.8% decrease in references to the `presence' of force. This suggests that judges are mentioning `coercion' less

frequently, and that they are minimizing its presence when they do mention it!

This trend is further indicated by the fact that even within the category `force; no consent', judges frequently minimize the degree of coercion involved. For example, the presence of a weapon is usually considered an aggravating factor, but judges occasionally indicated that it is a mitigating factor if the weapon was not actually `used' to inflict `injury' on the victim. Similar statements were also found in cases involving group attacks. For example, in one case the judges stated that a rape, in which 3 attackers confined a young girl for a number of hours and took turns having intercourse with her, was

> "not a gang rape as that term is usually understood. It was really three single rapes on the one complainant." (CA19)

The tendency to not mention the presence of coercion or force, and the tendency to minimize its presence when it is mentioned, are contrary to the reform's objective which was to emphasize the degree of violence involved in sexual offences. While the law emphasizes increasing degrees of coercion according to the presence of aggravating factors, judges distinguish between the absence and presence of coercion. Furthermore, these tendencies will influence the way in which judges determine the impact of the offence on the victim. For example, if the judge minimizes the degree of

coercion involved in the offence, it is doubtful that he/she will anticipate a serious psychological or physical impact for the victim. In the following sections, judicial definitions of the impact of the offence on the victim are examined.

4.4 PHYSICAL IMPACT OF THE OFFENCE ON THE VICTIM

One of the most objective indicators used to indicate the presence of violence in an assault was the absence or presence of physical injury. Each transcript, therefore, was categorized on the basis of the absence or presence of statements about the physical impact of the assault on the victim. This theme was indicated by statements about the degree of physical injury resulting from the sexual offence.

Using this definition, 78 transcripts (71.6%) contained no statement about the physical impact of the assault on the victim and were classified as `not mentioned'. The remaining 31 transcripts (28.4%) contained statements about the physical consequences of the offence and were classified as `mentioned'.

TABLE 4.4.1: ABSENCE/PRESENCE OF REFERENCES TO PHYSICAL IMPACT ON THE VICTIM

	F	%
not mentioned	78	71.6
mentioned	31	28.4
	---	----
	109	100%

Transcripts which contained references to the physical impact of the assault on the victim were then categorized according to judicial assertions about the degree of injury which resulted. Statements indicated the offence resulted in no injury (`no injury'), only minimal injury (`minimal injury'), or serious injury (`injury'). The distribution of statements into these categories has been summarized in Table 4.4.2.

TABLE 4.4.2: DISTRIBUTION OF STATEMENTS IN WHICH PHYSICAL INJURY MENTIONED

n=31

	F	%
no injury	11	35.5
minimal injury	8	25.8
serious injury	12	38.7
	--	----
	31	100%

Overall, 64.5% of the transcripts which `mentioned' the physical impact of the offence claimed there was some physical injury. Of those transcripts, 38.7% indicated that the offence had resulted in `serious injury' and 25.8% indicated that the offence had resulted in `minimal injury'. In addition, 35.5% claimed there had been `no physical injury'; that is, that there was no physical impact other than the sexual interference involved in the offence.

TABLE 4.4.3: `PHYSICAL IMPACT' BY DATE

	1975-1982		1983-1988	
	F	%	F	%
NOT MENTIONED	30	81.1	48	66.7
MENTIONED	7	18.9	24	33.3
	37	100%	72	100%
(mentioned by date)				
no injury	2	5.4	9	12.5
minimal injury	0	0.0	8	11.1
serious injury	5	13.5	7	9.7
	7	18.9%	24	33.3%

The percentage of transcripts in which `physical impact' is `mentioned' increased from 18.9% before 1983 to 33.3% after 1983. The resulting 14.4% increase in transcripts in which `physical impact' is `mentioned', however, has not resulted in more descriptions of the physical impact as `serious injury'. Rather, the percentage of cases defined as serious dropped from 13.5% before 1983 to 9.7% after 1983. At the same time, there has been a dramatic increase in statements claiming there was only minimal injury or no injury. The `minimal injury' category increased from 0.0% before 1983 to 11.1% after 1983, and the `no injury' category increased from 5.4% before 1983 to 12.5% after 1983.

These findings suggest judges are attempting to reflect the three tier classification of sexual assault in their sentencing decisions. Although the level of sexual assault is determined at the charging and conviction stages, judges appear to be classifying the seriousness of sexual assault by

delineating the degree of physical injury involved. This is important because the classification scheme is designed to increase the punishment as the degree of physical injury increases. However, it is also clear that judges tend to view the physical impact of most sexual attacks as relatively minor. In addition, judges tend to rely on medical treatment as evidence of 'injury'. Indicators of injury included the presence of cuts, bruises, burns, beatings and potentially fatal circumstances such as severe beatings or wounding. However, the importance of these indicators varies between judges. For example, bruising may be considered a serious form of injury by one judge and considered a minor form of injury by another judge. In addition, the presence of certain injuries may be considered an aggravating factor in one case and a mitigating factor in another. For example, the presence of wounds or a beating are usually considered serious forms of physical injury. Occasionally, however, judges emphasize the possibility of death which could have occurred in the situation and underestimate the significance of the actual injury.

These findings suggest that judges narrowly define sexual assault and its impact on victims. The category 'no injury' indicates that penetration/sexual interference is not seen as a physical impact. In addition, the reliance on visible injury which requires medical treatment as evidence of serious injury ignores other types of physical impact, such as the

potential for pregnancy or life-threatening sexually transmitted diseases such as AIDS. This also underestimates the physical consequences endured by victims who do not immediately report the incident and by victims who have experienced long term abuse such as those involved in incestuous relationships. In addition, it underestimates the impact of cases which do not require or do not receive medical attention.

4.5 PSYCHOLOGICAL IMPACT:

Victimization surveys and rape crisis groups indicate that the psychological consequences of sexual violence are severe and long-lasting (Marshall, 1988; Hall, 1983). Research by Dean Kilpatrick at Medical University in South Carolina (cited in Marshall, 1988:227) illustrated the psychological trauma of sexual offence victimization.

TABLE 4.5.1: EFFECTS OF CRIME ON WOMEN
(cited in Marshall, 1988: 227)

Study of 2000+ women Ages 18 - 20	Had nervous breakdown	Thought Seriously of suicide	Attempted Suicide
non-victims	3.3%	6.8%	2.2%
Victims of:			
Attempted rape	8.9%	29.1%	8.9%
Completed rape	16.0%	44.0%	19.0%
Attempted sexual molestation	5.4%	32.4%	8.1%
Completed sexual molestation	1.8%	21.8%	3.6%
Attempted robbery	0.0%	9.1%	12.1%
Completed robbery	7.7%	10.8%	3.1%
Aggravated assault	2.1%	14.9%	4.3%

Kilpatrick found that 44% of rape victims thought seriously about suicide and 19% actually attempted it. In addition, 32.4% of attempted sexual molestation victims also seriously considered suicide. These figures lend support to references of rape as "the ultimate violation" (Marshall, 1988:221).

The 1983 legislative changes did not specifically address the issue of the psychological impact of sexual assault. However, previous literature on sexual assault (LaFree, 1979; Boyle, 1984) and comments by judges in this study indicated that the degree of psychological impact of the offence on the victim is also important for judicial definitions of the seriousness of an assault.

Each transcript was categorized on the basis of the absence or presence of statements concerning the `psychological impact' or emotional well-being of the victim following the attack(s). Indicators used to measure this theme included all references to the `impact' or `consequences' of the offence for the victim which were not identified as physical consequences. References to the `psychological' or `emotional' consequences and references to transitory emotions such as `anger' or `fear' were also utilized as indicators.

Using these indicators, 60 transcripts (55%) contained no references to the `psychological impact' of the offence on the victim and were classified as `not mentioned'. The

remaining 49 transcripts (45%), which contained statements about the `psychological impact' of the offence on the victim were categorized as `mentioned'.

TABLE 4.5.2: ABSENCE/PRESENCE OF REFERENCES TO `PSYCHOLOGICAL IMPACT'

	F	%
not mentioned	60	55.0
mentioned	49	13.8
	---	----
	109	100%

Transcripts which `mentioned' the `psychological impact' of the offence were then categorized into statements indicating either the absence (`no impact') or presence (`impact') of psychological impact on the victim. A third category (`contradictions') represented transcripts which contained statements indicating both the absence and presence of psychological impact.

TABLE 4.5.3: DISTRIBUTION OF TRANSCRIPTS IN WHICH PSYCHOLOGICAL IMPACT ON THE VICTIM IS `MENTIONED'

n=49

	F	%
no impact	15	30.6
impact	32	65.3
contradictions	2	4.1
	--	----
	49	100%

In transcripts which `mentioned' the psychological impact of the offence on the victim, 30.6% stated that there was `no psychological impact' on the victim and 65.3% stated there was a `psychological impact' on the victim. Contradictory messages were found in 4.1% of these transcripts which stated

there was both `no impact' and an `impact' on the victim.

Transcripts which maintained there was a `psychological impact' were further categorized according to the degree of impact involved.

TABLE 4.5.4: DEGREE OF PSYCHOLOGICAL IMPACT IN TRANSCRIPTS WHICH INDICATED THE PRESENCE OF PSYCHOLOGICAL IMPACT

n=32

	F	%
short-term/minimal impact	9	28.1
potential long-term impact	6	18.8
serious impact	17	53.1
	32	100%

In these transcripts, 28.1% indicated that the `psychological impact' which did occur was short-term or minimal; 18.8% referred to the `potential' for long term consequences but did not specify the nature of these consequences; and 53.1% referred to a `serious psychological impact' on the victim.

TABLE 4.5.5: `PSYCHOLOGICAL IMPACT ON VICTIM' BY DATE

	1975-1982		1983-1988	
	F	%	F	%
NOT MENTIONED	25	67.6	35	48.6
MENTIONED	12	32.4	37	51.4
	37	100%	72	100%
(mentioned by date)				
no impact	4	10.8	11	15.3
impact	8	21.6	24	33.3
contradictions	0	0.0	2	2.8
	37	100%	72	100%

The number of transcripts in which `psychological impact' is `mentioned' increased from 32.4% before 1983 to 51.4% after 1983. Transcripts indicating `no psychological impact' increased from 10.8% before 1983 to 15.3% after 1983; transcripts indicating a `psychological impact' on the victim increased from 21.6% before 1983 to 33.3% after 1983; transcripts containing `contradictions' increased from 0.0% before 1983 to 2.8% after 1983.

These findings suggest that since 1983 judges are considering the psychological impact of the offence on the victim more frequently in their sentencing decisions. In these references, however, judicial definitions appear to minimize the actual degree of psychological impact from sexual attacks. There has been an increase in statements claiming the absence of any psychological impact. There has also been an increase in statements indicating the presence of a psychological impact. This increase, however, obscures the trend in which judges minimize the seriousness of the psychological impact of the offence on the victim.

TABLE 4.5.6: DEGREE OF PSYCHOLOGICAL IMPACT IN TRANSCRIPTS WHICH INDICATED THE PRESENCE OF PSYCHOLOGICAL IMPACT BY DATE

n=32

	1975-1982		1983-1988	
	F	%	F	%
short term/minimal impact	2	25.0	7	29.2
potential long term impact	1	12.5	5	20.8
serious impact	5	62.5	12	50.0
	-	----	--	----
	8	100%	24	100%

Statements that the offence resulted in `serious' psychological impact for the victim decreased from 62.5% before 1983 to 50.0% after 1983. Statements that the offence resulted in a `potential long term impact' increased from 12.5% before 1983 to 20.8% after 1983 and statements that the offence resulted in `short term/minimal' impact increased from 25.0% before 1983 to 29.2% after 1983. These findings suggest that although a psychological impact is `mentioned' more often, judges are increasingly describing the impact as `minimal' or as `potentially' serious rather than as `serious'.

Acknowledgement of psychological impact frequently relied on evidence of behavioral changes in the victim. Victims who sought professional psychiatric counselling or changed their jobs and residences due to fear, for example, were seen as traumatized. Nightmares, bedwetting, or sudden drops in grades at school by children were indicative of an impact. Some behavioral indicators, however, were not consistently used as indicators of a psychological impact on the victim. Attempted suicide, for example, was indicative only of a `potential' impact in one case, and indicative of a `short term' consequence in another.

Judges often relied on variables other than psychological criteria to determine the presence of, and extent of, a psychological impact on a victim. For example, their definitions of the psychological trauma were often influenced

by the age and sexual history of the victim. The judges' statements implied that younger girls and virgins are more seriously traumatized than older females and non-virgins;

> "She admittedly is not a virgin, but that does not entitle others to take her at will. It does lead me to believe, and the evidence led me to believe, that she was more than a little shaken by the experience and she will remember it for a long time, but I acknowledge that perhaps the damage to her might be slightly less than to some other persons." (QB18)

In comparing virgins and non-virgins, judges imply that the sexual experience in sexual assault has the same character as in consensual sexual encounters!

The relationship between the offender and the victim also seemed to be important. Judges implied that violent attacks by strangers are the most traumatic. Yet Boyle's (1984) evidence indicated that the victim's psychological well-being is more affected by attacks which more closely resemble typical sexual behavior by `known' attackers (Bond and Adams, 1988:10). According to this argument, this behavior erodes the victim's trust in intimate relationships whereas sexual violence at the hands of a stranger heightens a general distrust of strangers.

Judges also examined the victim's behavior following the offence to determine the extent of psychological impact. For example, judges claimed an immediate complaint indicated that the victim had been severely traumatized; whereas a delay in the complaint indicated that the victim was less seriously traumatized. In addition, if the victim continued to

associate with the accused, or her demeanour in court was calm, judges concluded that minimal psychological impact had resulted. Finally, if the woman was drunk or refused to see a psychiatrist, it was assumed that there was no psychological impact.

Using these variables to determine the extent of the psychological impact of the offence on a victim results in narrow definitions of the impact of sexual violence. As a result, the psychological impact on the victim may be underestimated in a variety of situations. For example, a reliance on professional/psychiatric counselling may be misleading. While the psychiatric community has much to offer, there are many reasons a victim of a sexual attack may not seek/obtain professional psychiatric counselling. Stigma associated with obtaining psychiatric care and cost are two important reasons. The fear of further victimization may also inhibit victims from obtaining professional counselling. Unless judges recognize the limitations of this indicator, they will underestimate the impact for victims who do not obtain counselling.

Reliance upon the victim's demeanour in court is also very problematic. For example, some victims may be more controlled or relaxed in court; there may be an extended time period between the incident and the trial, and the victim may have dealt with the more visible signs of trauma; the prosecution may prepare some witnesses better than others; or

the victim may guard against an emotional outburst. In addition, judges are often inconsistent in their application of this measure. Thus, a calm or absent victim may be considered uncaring in one case or too traumatized to attend court in the next. The way judges define the victim's demeanour in court more accurately illustrates individual judge's beliefs and attitudes about victims of sexual violence than it illustrates the degree of psychological impact.

Another problematic indicator is the assumption that without evidence presented in court documenting the presence of severe trauma, there was no psychological impact. Whether this evidence is presented in court is dependent upon the decisions of the prosecution and its resources. Limited contact and poor communication between the Crown representatives and the victims, overburdened prosecutors, and the tendency for the legal representative to change at each level of the case (ie. different lawyers present the case) undermine the Crown's ability to present, or even be aware of, the psychological consequences of the assault for the victim. Unless judges acknowledge the procedural limitations in dealing with victims of sexual assault, they will underestimate psychological consequences if they rely on `evidence' of its existence in each case.

Overall, there is a tendency by judges to minimize the psychological impact of sexual violence and to rely on faulty assumptions concerning the nature of sexual offences and the

response of victims. Findings by Marshall (1988), Hall (1985), and the Canadian Urban Victimization Survey (1984) suggest that trauma IS the norm. Clearly, judges' statements do not reflect this finding.

4.6 BREACH OF TRUST

Although stereotypes depict sexual violence as attacks by strangers in back alleys, the reality is that a large proportion of sexual offences involve relatives or acquaintances. The Canadian Urban Victimization Survey (1984) found that 41% of the sexual assault victims knew their assailants. This is particularly true in cases involving the sexual abuse of children. The "Badgley Report" (Canada, 1984), for example, found that 46% of all sexual assaults on children in Canada are incestuous.

As more information about the reality of sexual violence became available, there has been an increased awareness of the special issues of the exploitation of vulnerability and trust, particularly of children and teenagers. However, the issue of exploitation of vulnerability and trust was not limited to children. It was also recognized that an adult's `trust' and vulnerability could be exploited. For example, trust could be exploited by family members and friends. In addition, for the first time there was an awareness that a women is vulnerable to her husband's sexual aggression. These issues have been reflected in debates about `breach of trust'

`Breach of trust' refers to situations in which the accused exploited or manipulated a relationship with the victim in order to perpetrate the offence. That is, the accused exploited his authority, friendship, or family relationship with the victim in order to commit the offence. Breach of trust situations can be distinguished from assaults which involved sudden attacks by strangers with whom the victim has had no prior association.

It is important to study judicial definitions of `breach of trust' for two reasons. First, the Canadian Sentencing Commission identified `breach of trust' as an important factor to be incorporated into the guidelines of aggravating factors. The Commission assumes the term is non-problematic and will be applied consistently.

Second, the notion of victim precipitation affects the notion of exploitation. In examining judicial definitions of breach of trust, biases, such as the `blaming the victim' ideology that victims `ask for it' by putting themselves in certain situations, may become evident.

Each transcript was categorized on the basis of the absence or presence of statements concerning a `breach of trust'. Indicators of the presence of this theme included statements about: mistrust, a breach of trust, references to the special status of the accused in comparison to the victim (for example, references to a parental role or a position of

trust), and references to the exploitation of the victim's trust or vulnerability. Probation orders dictating that the offender have limited, or no access to the victim (or to other people with similar characteristics in similar circumstances) were also used to indicate the presence of the category `breach of trust'.

Using these indicators, 77 transcripts (70.6%) contained no reference to `breach of trust' and were classified as `not mentioned'. The remaining 32 transcripts (29.4%) contained statements about `breach of trust' and were categorized as `mentioned'.

TABLE 4.6.1: ABSENCE/PRESENCE OF REFERENCES TO `BREACH OF TRUST'

	F	%
not mentioned	77	70.6
mentioned	32	29.4
	---	----
	109	100%

Transcripts which contained references to breach of trust were categorized according to the type of breach of trust involved. The distinctions between these types of breach of trust reflect a range of situations in which the accused had direct authority over the victim to situations in which he had no authority over the victim. Realistically, the boundaries between the types are blurred or ambiguous but for the purpose of this research, the categories of breach of trust identified

included: `breach of authority', `exploitation of vulnerability', and `breach of community trust'.

`Breach of authority' refers to situations in which the accused had clear authority over the victim. It refers to sexual offences committed by parents, teachers, and caretakers such as babysitters and foster parents. `Exploitation of vulnerability', on the other hand, refers to situations in which the offender did not have direct authority over the victim, but did have the victim's trust. That trust may have been based on a previous relationship between the offender and the victim, or may be based on the superior social status of the accused (for example, an adult-child relationship). In these situations, the offender frequently had indirect authority over the victim and exploited the victim's trust or vulnerability in order to perpetrate the offence. For example, one case involved an offence in which the accused assaulted a young girl who was babysitting his friend's children. He went to the house on the pretext of `checking on the children', and upon entry, sexually assaulted the babysitter. The third category, `breach of community trust', refers to incidents in which the offender had no authority over the victim at all. Rather, the victim voluntarily chose to interact with the offender due to a sense of helpfulness or friendship and then had that relationship exploited by the accused.

The distribution of transcripts which contained references to a breach of trust is presented in Table 4.6.2.

TABLE 4.6.2: DISTRIBUTION OF TRANSCRIPTS IN WHICH BREACH OF TRUST IS `MENTIONED'

n=32

	F	%
breach of authority	17	53.1
exploitation of vulnerability	10	31.3
breach of community trust	5	15.6
	32	100%

In the transcripts which `mentioned breach of trust', 53.1% referred to a breach of authority; 31.3% referred to the `exploitation of the victim's vulnerability' or trust; and 15.1% referred to a `breach of community trust'.

Transcripts which did `not mention breach of trust' were also examined. These transcripts were categorized according to the absence or presence of a previous relationship between the offender and the victim. The first category (`no relationship') refers to offences in which the victim and the offender were strangers with no prior association. The second category (`relationship') refers to cases in which the accused and complainant established some form of relationship, however brief, prior to the sexual attack. Relationships in these cases ranged from long-term parent-child associations to short-term flirtations in the bar or accepting rides from acquaintances. The distribution of these transcripts is summarized in Table 4.6.3.

TABLE 4.6.3: TRANSCRIPTS IN WHICH BREACH OF TRUST IS `NOT MENTIONED'

n=77

	F	%
no relationship	28	36.4
relationship	49	63.6
	77	100%

In the transcripts which did `not mention breach of trust', 36.4% involved no previous relationship between the accused and the victim; that is, the offence involved a stranger to the victim. While these transcripts, therefore, are not relevant to the discussion of breach of trust, the majority of the cases did, in fact, involve cases where the victim had some relationship to the offender. Therefore, 63.6% of these transcripts could have been defined as involving some form of breach of trust, but were not. Obviously, judges failed to delineate the importance of breach of trust as a sentencing factor in a substantial proportion of cases.

When one examines the distribution of the transcripts by the type of relationship between offender and accused, interesting trends emerge. These trends are illustrated in Table 4.6.4.

Not surprisingly, `breach of trust' is mentioned more frequently in situations involving family members (other than fathers/stepfathers) (72.7%) and persons in authority/ custodian relationships (55.6%). It is surprising, however, that almost half of the transcripts (47.1%) involving an

offence by a father or stepfather did NOT mention a breach of trust. In addition, 77.3% of the cases involving friends/acquaintances did not mention a `breach of trust'.

Table 4.6.4: ABSENCE/PRESENCE OF REFERENCES TO BREACH OF TRUST BY TYPE OF RELATIONSHIP BETWEEN THE VICTIM AND THE OFFENDER

n=81

	Father/ Stepfather		Family Member		Authority/ Custodian		Friend	
mentioned	9	52.9%	8	72.7%	5	55.6%	10	22.7%
not mentioned	8	47.1%	3	27.3%	4	44.4%	34	77.3%
	17	100%	11	100%	9	100%	44	100%

*Cases in which the accused was a stranger to the victim were excluded.

These findings suggest judges use relatively narrow definitions of `breach of trust', that is, a definition based on the abuse of authority or quasi-authority relations (including parental and familial authority). However, even within this narrow definition judges frequently fail to mention the presence of a `breach of trust'. As indicated above, judges failed to mention a `breach of trust' in 47.1% of the cases involving a father or stepfather and in 44.4% of the cases involving an authority figure or custodian! Unless judges systematically recognize all forms of a `breach of trust', the seriousness of sexual violence by an acquaintance or an intimate will continue to be underestimated and a substantial proportion of victims will continue to be denied justice and protection. It is important, therefore, to

examine whether the 1983 reform influenced judicial definitions of breach of trust.

TABLE 4.6.5: `BREACH OF TRUST' BY DATE

	1975-1982		1983-1988	
	F	%	F	%
NOT MENTIONED	30	81.1	47	65.3
MENTIONED	7	18.9	25	34.7
	37	100%	72	100%
(not mentioned by date)				
no relationship	17	45.9	11	15.3
relationship	13	35.1	36	50.0
	30	81.1%	47	65.3%
(mentioned by date)				
breach of authority relations	0	0.0	13	18.1
exploitation of vulnerability	3	8.1	11	15.3
breach of `community' trust	4	10.8	1	1.4
	7	18.9%	25	34.7%

The percentage of transcripts in which `breach of trust' was `mentioned' increased from 18.9% before 1983 to 34.7% after 1983. Transcripts which referred to a `breach of authority' relations increased from 0.0% before 1983 to 18.1% after 1983; transcripts which mentioned the `exploitation of vulnerability' increased from 8.1% before 1983 to 15.3% after 1983. However, transcripts which referred to a `breach of community trust' decreased from 10.8% before 1983 to 1.4% after 1983. This could suggest that judges are now specifying more frequently the type of `breach of trust' involved in an offence. However, 50% of the transcripts between 1983-1988 could have been defined as involving some form of `breach of trust' but did not contain any references to it. Transcripts

in which `breach of trust' was `not mentioned' and which referred to an offence in which the offender and the victim had no previous relationship decreased from 45.9% before 1983 to 15.3% after 1983. Transcripts in which `breach of trust' was `not mentioned' and which referred to an offence in which the offender and the victim had a previous relationship increased from 35.1% before 1983 to 50.0% after 1983. Although there may be greater awareness of `breach of trust' by those with authority or those who exploit the victim's vulnerability and trust, judges continue to fail to mention the presence of `breach of trust' in a large proportion of cases.

Furthermore, it is not clear how judges determine what constitutes a breach of trust. The most obvious form of breach of trust, that is, `breach of authority', is not consistently mentioned. In addition, there is inconsistency in the category `exploitation of vulnerability'. In most cases in this category, the abuse of a relationship based on trust was considered an aggravating factor. But, in the two offences in which the victim and offender were married (but separated), the trial judges maintained that the previous relationship was a mitigating factor. This was also evident in a case in which the offender and victim had previously engaged in a sexual relationship. These cases suggest that violence at the hands of a person with whom one has had an

intimate relationship will continue to be underestimated. In addition, these cases imply that judges are not distinguishing between consensual and coercive sexuality.

4.7 THE SIGNIFICANCE OF PENETRATION

Prior to 1983, `rape' referred specifically to assaults in which penile-vaginal penetration had occurred. It was distinguished from attempted rape, in which such penetration was attempted but not completed, and indecent assault. Indecent assault, which had a less severe penalty than rape,[1] functioned as a "catch-all" for other offences. The classification of offences on the basis of penile-vaginal penetration was severely criticized by groups seeking reform. The application of this limited criterion meant that many brutal and humiliating offences were treated leniently simply because they did not involve PENILE-vaginal penetration. Examples of these offences included offences involving penetration by objects other than the penis or involving penetration of the anus or mouth.

To rectify this problem, Bill C-127 eliminated the offences rape and indecent assault and replaced them with a three tier classification of sexual assault which differentiated between offences on the basis of the degree of violence involved rather than the type of sexual activity

involved. The following discussion investigates whether the new legislation influenced judicial definitions about the significance of penile-vaginal penetration.

Each transcript was categorized on the basis of the absence or presence of statements concerning the `types of sexual acts' involved in the offence. Statements about the `type of sexual act', in particular references to penile-vaginal penetration, were used as indicators of this category.

The 89 transcripts (81.7%) which contained no reference to the `type of sexual act' involved in the offence were classified as `not mentioned'. The remaining 20 transcripts which contained statements about the `types of sexual acts' involved in the offence were classified as `mentioned'.

TABLE 4.7.1: ABSENCE/PRESENCE OF REFERENCES TO TYPE OF SEXUAL ACT INVOLVED IN THE OFFENCE

	F	%
not mentioned	89	81.7
mentioned	20	18.3
	109	100%

Transcripts which `mentioned' the `type of sexual act' involved in the offence discussed the relative seriousness of various forms of sexual activities compared to penile-vaginal penetration. `Penetration' may refer to the insertion of fingers or toes into the vagina or anus (digital penetration),

cunnilingus, fellatio, the insertion of the penis into the vagina (penile-vaginal penetration) or the anus (anal penetration or buggery), and the insertion of any other object [2] into the mouth, vagina or anus. For the purpose of this discussion, `penetration' refers to penile-vaginal penetration and references to any other form of penetration are specified.

The relative seriousness of various forms of sexual acts was classified into three categories. The first category (`no penetration: not serious offence') referred to fondling or touching of genitalia and secondary sexual characteristics, such as breasts, and were considered less serious forms of sexual interference. In the second category (`no penetration: serious offence'), judges recognized that there were variations in what constitutes touching and that certain forms of touching are more serious than others. This category included cases which involved touching and which were defined as more serious if the act was accompanied by injuries such as beatings, burns, or wounds. In addition, it included cases in which other forms of `penetration' occurred.

The final category (`penetration: serious offence') contained references to the seriousness of penile-vaginal penetration. Statements concerning actual penile penetration reinforce an emphasis on that particular form of penetration, maintaining that a lack of penetration is a mitigating factor and the presence of penetration an aggravating factor. Some statements, however, suggest that, even though penetration did not occur, the assault was serious.

TABLE 4.7.2: DISTRIBUTION OF TRANSCRIPTS IN WHICH TYPE OF SEXUAL ACT `MENTIONED'

n=20

	F	%
no penetration: not serious offence	10	50
no penetration: serious offence	3	15
penetration: serious offence	7	35
	20	100%

It is clear that penetration by the penis is a central defining element. In the transcripts which `mentioned' the `type of sexual act' involved in the offence, only 15% made a clear statement that an assault without penile-vaginal penetration was as serious as an assault involving penile-vaginal penetration; 35% stated the incident was a serious offence accompanied by penetration; and 50% stated that the offence was a less serious incident because there was no `penetration'.

Given the legal distinctions between rape and indecent assault, this finding is not surprising. Table 4.7.3 examines whether the significance of penile penetration has changed since the implementation of sexual assault offences.

The percentage of transcripts in which the `type of sexual act' is `mentioned' increased from 10.8% before 1983 to 22.2% after 1983. Transcripts which referred to offences as `serious' because they involved `penetration' increased from 0.0% before 1983 to 9.7% after 1983; transcripts which referred to offences as `less serious' because there was no penetration increased from 8.1% before 1983 to 9.7% after 1983; and transcripts which referred to offences as serious

despite the absence of penetration increased from 2.7% before 1983 to 2.8% after 1983.

TABLE 4.7.3: `TYPE OF SEXUAL ACT' BY DATE

	1975-1982 F	%	1983-1988 F	%
NOT MENTIONED	33	89.2	56	77.8
MENTIONED	4	10.8	16	22.2
	37	100%	72	100%
(mentioned by date)				
no penetration;not serious	3	8.1	7	9.7
no penetration; serious	1	2.7	2	2.8
penetration; serious	0	0.0	7	9.7
	4	10.8%	16	22.2%

These findings suggest that judges have merely shifted penile-vaginal penetration from a `charging' factor to a `sentencing' factor. That is, although the offence is no longer distinguished by the absence/presence of penetration, judges continue to reflect this distinction in their sentencing decisions.

This emphasis on penetration may result in the underestimation of the impact of other forms of sexual violence. Judges need to consider the actual circumstances of an offence and not merely whether or not there has been penile-vaginal penetration. This is especially true for cases involving `attempted' penile-vaginal penetration. Judges in the study tended to see attempted attacks as less serious

because the actual penetration did not occur;

> "the accused only attempted intercourse so he should not be punished as though he raped the complainant." (QB30.1)

Although an accused may be unsuccessful in his attempts to achieve penetration, it does not negate his intent nor any violence which may have been used in the attempt. Furthermore, the injuries sustained by the victim, both physical and psychological, may be as great in other forms of sexual interference as in penile-vaginal penetration. For example, the tearing of a child's hymen through digital penetration, or the injuries sustained when an object is inserted into the vagina or anus also have a severe impact on the victim. Yet, in one case, the fact that the injuries sustained were caused by digital penetration rather than penile penetration was considered a mitigating factor which made the offence less serious!

Second, an emphasis on penile-vaginal penetration presupposes the `norm' of sexual behavior is penile-vaginal penetration. This has important implications for homosexual attacks because any form of homosexual aggression is thereby defined as `deviant' and more serious. As a result, homosexual attacks may be treated more seriously than heterosexual assaults of equal or greater violence.[3] This would undermine the significance of changes in the law which removed the disproportionate punishment for a sexual assault against a male versus a sexual assault against a female.

Finally, an emphasis on penile-vaginal penetration has implications for attempts to clarify what constitutes `sexual' in sexual assaults. The definition of `sexual' in sexual assaults was not specified in Bill C-127 and as a result, there have been controversial interpretations of `sexual' in the application of the new law (Boyle et al., 1985). Three approaches have been suggested to clarify the definition of sexual assault. The first suggestion maintains that the definition should reflect the subjective view of the complainant (Boyle, 1984). Because the offender's motive may be to humiliate rather than to obtain sexual gratification, Boyle (1984) argues it is dangerous to use the offender's subjective definition to establish the presence of a `sexual' element (Bond and Adams, 1988).

The second approach, the biological approach, maintains that sexual assault should refer to violations which involve contact with or by genitalia (Dawson, 1985). The dangers of this narrow application, however, became apparent in the Nova Scotia decision (R. v. Chase)[4] which concluded that touching a woman's breasts does not constitute sexual assault because breasts are secondary sexual characteristics analogous to a man's beard. Subsequent decisions rejected this conclusion, stating that due to the cultural definition of breasts as sexual, any violations of them constitutes a sexual assault. Other decisions stated sexual assault included "assault with the intent to have intercourse without consent"; "assault for

the purpose of sexual gratification" and "acts which degrade and demean for the purpose of sexual gratification" (Boyle et al., 1985:58). Boyle (1984:75) concluded that courts will likely continue to use an objective test based on touching of genitalia "or any touching accompanied by words relating to sex". However because this definition depends upon the judge's interpretation, cases at the "less serious end of the spectrum" will continue to be determined by the biases of the individual judge (Boyle et al., 1985:75).

In 1987, the Chase decision was reversed by the Supreme Court of Canada[5] and an objective test was established. According to this ruling, a sexual assault involves

> an assault committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated and where the sexual context of the assault is visible to a reasonable observer. The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act and all other circumstances surrounding the conduct are considered relevant. The intent or purpose of the person committing the act may also be a factor.

Whether this definition will adequately cover all circumstances of sexual assault remains to be seen. Bond and Adams (1988:8) argue that vague or incomplete definitions may continue to exclude certain women from legal protection against sexual violence. Vandervort (1985:45) argues that we must "eliminate the gulf between the legal and social definitions of sexual assault." In doing so, however, we must recognize that our understandings of what constitutes `sexual'

is not gender neutral. Rather, the different social, psychological and cultural definitions associated with male and female sexuality, the impact of sexual aggression, and the motivation of offenders must all be reflected in the legal definitions and practical applications of sexual assault legislation (Boyle et al., 1985:59; Bond and Adams, 1988:8). It is these considerations which must now guide judicial interpretation of this new decision.

4.8 ACCUSED'S CRIMINAL HISTORY

Each transcript was analyzed for the presence or absence of statements about the offender's previous involvement in crime or propensity for further involvement in crime. Indicators of the theme `accused's criminal history' included statements about: the offender's criminal record, his previous involvement in crime, and the probability that he will commit crimes in the future.

The 54 transcripts (49.5%) which did not refer to the `accused's criminal history' were categorized as `not mentioned'. The 55 transcripts (50.5%) which did refer to this theme were categorized as `mentioned'.

TABLE 4.8.1: ABSENCE/PRESENCE OF REFERENCES TO `ACCUSED'S CRIMINAL HISTORY'

	F	%
not mentioned	54	49.5
mentioned	55	50.5
	---	----
	109	100%

Transcripts which `mentioned' the accused's previous involvement in criminal behavior were divided into two categories which reflected either the absence of previous criminal behavior (`isolated behavior') or the presence of previous criminal behavior by the offender (`not isolated behavior').

TABLE 4.8.2: DISTRIBUTION OF TRANSCRIPTS IN WHICH THE ACCUSED'S CRIMINAL HISTORY `MENTIONED'

n=55

	F	%
isolated behavior	15	27.3
not isolated behavior	40	72.7
	55	100%

In the transcripts which `mentioned' the accused's criminal history, 27.3% maintained that the offence represented `isolated behavior' by the accused; that is, that the offence was the accused's first criminal offence. The remaining 72.7% stated that the offence was `not isolated behavior' by the accused; that is, the offence was not the accused's first criminal offence.

TABLE 4.8.3: `ACCUSED'S CRIMINAL HISTORY' BY DATE

	1975-1982		1983-1988	
	F	%	F	%
NOT MENTIONED	21	56.8	33	45.8
MENTIONED	16	43.2	39	54.2
	37	100%	72	100%
(mentioned by date)				
isolated behavior	3	8.1	12	16.7
not isolated behavior	13	35.1	27	37.5
	16	43.2%	39	54.2%

The percentage of transcripts in which `the accused's criminal history' is `mentioned' increased from 43.2% before 1983 to 54.2% after 1983. While this means judges are stating the accused's criminal history more frequently, most of the increase has been generated in the category defined as `isolated behavior'. Transcripts which referred to `isolated behavior' increased from 8.1% before 1983 to 16.7% after 1983; transcripts which referred to `not isolated behavior' increased from 35.1% before 1983 to 37.5% after 1983.

This increase in the rate that the judges refer to the accused's isolated behavior could possible mean that more first time sexual offenders are appearing in court and/or it could reflect judicial attempts to clarify the basis of their judgments. Either possibility is a positive trend for those seeking greater justice in the treatment of sexual violence.

Problems, however, persist. The Canadian Sentencing Commission stated that the existence of previous convictions is an aggravating factor and the absence of previous convictions is a mitigating factor. Yet judges used much more complex categories to determine if a previous record is an aggravating factor. For example, they differentiated between the type of crimes (that is, whether an offence was a sexual, property or personal crime) and the level of violence involved in previous convictions. In addition, they specified whether or not the offence was the accused's first `sexual' offence or one of a number of sexual offences.

TABLE 4.8.4: TYPE OF OFFENCE IN ACCUSED'S PREVIOUS CRIMINAL BEHAVIOR

n=40

	F	%
first sexual offence	11	27.5
not isolated sexual offence	14	35.0
criminal behavior in record not stated	15	37.5
	40	100%

In 37.5% of the transcripts in which the accused had a previous involvement in crime, the nature of the accused's criminal history was `not stated'. In 35% of these transcripts, judges stated the incident was `not an isolated sexual offence; that is, that it was only one among a number of other sexual offences committed by the accused. However, in 27.5% of the transcripts in which the nature of the accused's criminal history was specified (10.1% of all transcripts), judges stated the incident was the `first offence' of a sexual nature committed by this offender.

This distinction is important because judges are more likely to treat a case as less serious if it was the accused's first sexual offence. Despite the accused's previous involvement in other crimes, judges still frequently referred to such incidents as "isolated behavior" or "passing aberrations"! Even when it was indicated that the accused had engaged in previous sexual offences, judges often underrated the significance of this by claiming that the behavior had occurred infrequently. The impression given is that a person is not likely to be defined as a `sex offender' unless his

behavior is repeatedly of a sexual nature. This impression was reinforced by the fact that judges frequently referred to an accused's first criminal offence as a "passing aberration" or a "momentary lapse".

It is clear, therefore, that judges vacillate between using previous convictions as an aggravating factor and a mitigating factor. It also indicates that judges distinguish between sexual and aggressive crimes. However, a more critical issue is evident; that is, the assumption that judges can determine an accused's propensity to commit crime. The most common indicator used to measure an accused's propensity to commit crime was his criminal record. While the accused's criminal record is commonly considered an `objective' measure of the offender's previous criminal activity and propensity to reoffend, a number of issues systematically undermine its utility. `Records' are socially produced documents which are much less objective measures of an accused's criminal history than frequently supposed. Class and race biases perpetuated throughout the criminal justice process will also exist in final dispositions if judges blindly utilize this indicator. In addition, due to the low reporting rates by victims of sexual attacks, it is possible for an accused to commit numerous sexual offences without an official label of his behavior. Third, charges may be "down-crimed", that is, the person may be charged with a less serious offence, thus hiding the actual crime involved. An illuminating example of these

problems was evident in R. v. Probe.[6]

Judges also rely on other indicators to determine an accused's propensity to commit crime. Indicators which suggested the accused was not likely to engage in further criminal behavior included:

-the accused had been separated from the victim;

-there was no evidence of mental illness or sexual deviancy;

-the accused had previously exhibited `socially responsible' behavior. For example, he had a good employment history and had fulfilled the role of parent and `provider';

-the accused was under `duress' at the time of the offence. For example, his marriage was breaking down.

On the other hand, judges believed there was a high risk of reoffending for certain offenders. Such beliefs were frequently based on evidence that the offender suffered some form of mental illness or suffered from chronic alcohol or drug abuse.

These indicators outlined the ways in which judges `measure' an accused's propensity to commit crime. The following discussions examine in greater detail two of these indicators; that is, judicial definitions of the role of alcohol/drug abuse in sexual violence and the significance of the accused's control or lack of control over his sex drive.

4.9 ALCOHOL/DRUG ABUSE

Each transcript was analyzed for statements concerning the role of alcohol or narcotics in the offence. Any reference to the presence of alcohol or drugs was included as a statement representing this theme. The 70 transcripts (64.2%) which contained no statements about the role of alcohol or drug consumption by the offender(s) were classified as `not mentioned'. The 39 transcripts (35.8%) which contained references to alcohol or drug consumption were classified as `mentioned'.

TABLE 4.9.1: ABSENCE/PRESENCE OF REFERENCES TO ALCOHOL/DRUG CONSUMPTION

	F	%
not mentioned	70	64.2
mentioned	39	35.8
	---	----
	109	100%

Transcripts which `mentioned' alcohol or drug use consistently referred to the `presence' of substance abuse as an explanatory factor in the offence. Statements referred to: probation orders that the accused abstain from the use of alcohol or drugs; orders for the offender to participate in treatment programs; and statements that the prison term must be long enough to allow adequate treatment for drug or alcohol abuse. In most cases, judges stated that the accused was unaware of his actions or lacked insight or inhibitions due to the level of intoxication involved; although in some cases they did recognize that, despite a state of intoxication, the accused's behavior was planned and determined. The tendency

for intoxication to be defined a mitigating factor was further enhanced in situations in which the accused had voluntarily sought treatment.

A disturbing finding was that some statements reinforce a `blaming the victim' ideology, implying that alcohol/drug abuse by the accused is considered a more significant mitigating factor when the victim has also taken drugs or alcohol. In certain circumstances, the victim and offender did not even have to be drinking together for this type of judgement to occur!

The predominant theme reflected throughout these statements is that alcohol or drug abuse caused or contributed to the offence and thus explains why men normally of `good character' with no `tendency' to commit crime engage in sexual offences and why other men are consistently in trouble with the law. That is, the offence resulted because the offender did not have full use of his faculties.

The influence of this `loss of control' explanation is so strong that some judges are concerned when alcohol or narcotics are not involved in the offence. This was illustrated by the only transcript which referred to the `absence' of drugs or alcohol in the offence:

> "It cause me some concern that there is no suggestion that either of you was in any way influenced by the consumption of alcohol or drugs. Therefore, leaves me with only 1 conclusion that what you did you did with a fully comprehending mind and with due deliberation and consideration." (QB55).

The trial judge clearly defined the importance of substance abuse as a potential causal factor.

4.10 ACCUSED'S CONTROL OVER HIS SEXUAL DRIVE

In perpetuating the concept that alcohol or drug consumption `explains' a loss of control, judges are often implying that it is a loss of control over the accused's sexual drive which is the main problem. Thus, a second explanatory category referred to the role of sexual desire in explaining the accused's actions. Indicators of the presence of this theme included references to: the presence or absence of sexual deviancy or mental illness, uncontrolled passion, duress in the accused's life, societal expectations, or victim provocation.

Each transcript was analyzed for the presence or absence of statements about the role of the accused's sexual behavior in explaining the assault. The 74 transcripts (67.9%) which contained no references to the role of the accused's sexual control as an explanatory factor in the offence and were categorized as `not mentioned'. The remaining 35 transcripts (32.1%) contained references to this theme and were categorized as `mentioned'.

TABLE 4.10.1: ABSENCE/PRESENCE OF REFERENCES TO SEXUALITY

	F	%
not mentioned	74	67.9
mentioned	35	32.1
	---	----
	109	100%

Transcripts which `mentioned' the role of the accused's sexual drive consistently referred to the `presence' of uncontrolled sexual desire as an explanatory factor in the offence. However, statements indicated that the causes of this uncontrolled sexual desire varied across the cases. These causes were represented by five themes.

The first theme, `mental illness', included statements which claimed the accused suffered from some sort of identifiable mental illness or sexual deviancy which contributed to the offence. For example, the judge might refer to the offender as a `pedophile'.

In the second category (`uncontrolled passion'), statements indicated that the offence reflected a temporary loss of control by the accused over his sexual desires rather than an illness or sexual deviancy. According to these statements, the accused `lost control' because: he was intoxicated; he did not have regular sexual relations or no longer had relations with a partner, such as a wife; or he was sexually stimulated by the behavior of others around him.

The third category, `societal expectations', contained statements which maintained that the offence was a consequence of a society in which promiscuity and an emphasis on sexual prowess prevail.

The fourth category (`duress') contained references to the role of duress in the accused's life. Judges are both somewhat sceptical of explanations based on the presence of

duress in the accused's life, yet also consider it to be an important explanatory factor. Marriage breakdown, depression, and ill health were all listed as examples of duress which contributed to the offender's behavior.

The final category contained statements that implied victims somehow contributed to the unleashing of the accused's passion (`victim provocation'). Some statements indicated that the accused took his cue from the behavior of the victim. These statements implied victims usually do contribute somehow to their own victimization;

> "Speaking of this particular crime, the usual sentence is given where the man doesn't realize he must stop when the girl says `stop', but this is a little different. You started when the girl didn't even suggest anything about starting in the way of sexual approach. She wasn't in the least provocative toward you, she didn't entice you in any way at all. She clearly had no interest in you." (QB35)

In most transcripts, however, judges stated that the offence occurred despite the fact that the victim did not incite the accused's actions in any way. In addition, other statements claimed that the victim was actively involved in enticing the accused and consented to the sexual encounters. Such statements were concerned with cases in which the charge involved having sexual intercourse with a person "under age" (i.e. 14 years of age or younger). The problem with these references to consent was that they often ignored the age disparity between the victim and the offender and they ignored the subtle forms of coercion that the accused used to obtain

that `consent'.

The use of `intoxication' and `uncontrolled passion' as explanatory factors may affect the adjudication of sexual assault cases under the new legislation. Many of the defining elements which determine the offence charge, such as the presence/use of a weapon, or the presence of more than one offender, are premised upon the notion that they reflect a rational, conscious behavior. When intoxication and uncontrolled sexual drives are defined as mitigating factors, it is implied that the offence did not involve conscious behavior. This serves to diminish the accused's responsibility for the offence and may reduce the seriousness with which the offence is treated.

In addition, the use of intoxication and uncontrolled passion as explanatory factors fails to address sexual aggression as a social phenomenon as well as an individual act. These `explanatory' factors imply that the offence `just happened' and that the accused had minimal control over his actions;

> "In considering the subject's guilt or innocence of intent, it appears George did what he always does after a few drinks. [The victim] just happened to be there rather than his wife." (CA20)

Yet many of the offences in the study involved planning, extended over a period of time,[7] and involved manipulation of the victim and circumstances in order to accomplish the attack. Further, many people consume alcohol and/or drugs but

do not commit sexual attacks and people generally do not assault anyone and everyone they find sexually attractive. While alcohol and desire may influence the offender, there must be some belief by offenders that they can engage in such behavior. Feminists argue this `belief' is the product of a society which exploits and controls women's and children's sexuality.

4.11 SUMMARY

The findings presented in this chapter suggest that since 1983, judges are attempting to reflect the 3 tier classification scheme of sexual assault in their sentencing decisions. Since 1983, there has been an increase in the rate each theme is mentioned, except for the theme `coercion' which decreased. This anomaly is interesting because the new law is designed to reflect varying degrees of coercion which may be used to commit these offences.

Despite these increases, judicial definitions of sexual violence continue to reflect misconceptions about the reality of sexual violence and its impact on women. As a result, judges tend to minimize the seriousness of sexual violence. The implications of these findings are discussed in the following chapter.

CHAPTER 4 NOTES:

1.A maximum of 5 years for indecent assault on a female and 10 years for indecent assault on a male compared to the potential of life imprisonment for rape.

2.Examples of objects that were inserted into the victim's vagina or anus include: bottles, pencils, tools, guns and shoe heels!

3.Although statistical correlations were not tabulated, there is some suggestion a bias against homosexual attacks exists in the data files. For example, the sentence for a case in which a man offered 2 young boys $50 if they would perform fellatio on him was 2 years less 1 day. No actual acts occurred. In comparison, a gang rape of a young woman netted her 3 attackers the following sentences: 2 years less 1 day, 18 months, and 18 months. One man was given 2 years for molesting a young boy (touching the boy's genitalia). While sentences did go as high as 7 years for rape, the average sentence was around 2-3 years. A sexual assault on a 15 year old boy, with few aggravating factors resulted in a 4 year sentence. Yet 2 gang rapes, one of which involved a break and enter, each netted 3 years. If this trend can be established statistically, there is a clear gender bias in defining the seriousness of sexual aggression.

4.R. v. Chase (1984) 40 C.R. (3d) 282 (N.B.C.A.) leave granted to appeal to S.C.C. granted.

5.R. v. Chase (1987), 37 C.C.C. (3d) 97

6.[R. v. Probe (1983) CA#817] Probe committed numerous violent assaults, attempted rape and rapes against at least 15 women over a 10 year span. While his record included convictions for unlawful confinement, possession of a weapon dangerous to the public, assault causing bodily harm, and break and enter with intent to commit an indictable offence, he was not charged (successfully--2 charges of attempted rape were never pursued by police) with a sexual offence until the 14th and 15th victims! During the trial for these final, exceptionally brutal rapes, previous victims finally stepped forward with their stories and the sexual nature of previous `assaults' were outlined. As a result, after 10 years of terrorizing women, and with only 2 actual convictions for sexual offences, Probe was declared a `dangerous sexual offender' and sentenced to an indeterminant period in prison.

The impact of down criming can be further illustrated in R. v. Daniels [(1985) CA#2038]. The trial judge stated that there was no sexually related offence in the accused's record and outlined a record which included unlawful confinement,

robbery with violence, assaulting a police officer, and assaulting a lady. Closer inspection of the offences associated with these charges casts doubt on the absence of any `sexual' component in the accused's record. For example, the forcible confinement conviction resulted from a situation in which the offender confined an elderly man in a car at gunpoint. He forced the victim to drive around for several hours. At one point, the accused made the victim remove his clothing entirely, and then later allowed him to put them back on. The accused then stole money from the victim and left. It could be argued that this offence did indeed involve a sexual element.

7.For example, one sexual assault extended over 11 hours!

CHAPTER 5: CONCLUSIONS

5.1 SUMMARY AND IMPLICATIONS OF THE FINDINGS

During the 1960s and 1970s, rape emerged as a significant social problem and a symbolic component of the women's equal rights movement. The inadequate response of the criminal justice system to sexual violence was a central issue. Feminists demonstrated that rape case processing was characterized by high attrition at all levels of the criminal justice system and that victims of sexual violence were `victimized' by both the offender and the criminal justice system. Feminist demands for reform culminated in the passing of Bill C-127 in 1983. The new sexual offences legislation included a number of significant changes: it created a 3 tier classification of the offence `sexual assault' and eliminated the offences `rape' and `indecent assault'; it clarified certain rules of law which governed sexual offence trials and abrogated others which previously made convictions difficult to obtain; it `degenderized' the offences so they were applicable to members of either sex; it eliminated spousal immunity to allow for the prosecution of a spouse with whom the complainant is still living; and it moved sexual offences to Part VI of the Criminal Code "Offences Against the Person and Reputation".

These changes reflected a number of objectives. It was hoped that the reform would decrease the attrition rate of

rape case processing and increase victim access to the criminal justice system. In addition, the reform was designed to extend equal protection to all groups and to redefine rape from a crime of `passion' to a crime of `violence'. In clarifying these issues, it was believed that the treatment of rape in the criminal justice system would be comparable to the treatment of other crimes of violence and that the myths which misrepresent the reality of sexual violence would be eliminated.

Studies in both Canada and the United States (which had similar law reform) which have evaluated the impact of the reform (Boyle, 1984; Renner and Sahjpaul, 1986; Snider, 1984) suggest that for the most part, it has not succeeded in obtaining these objectives. The rates of reporting, prosecuting and convicting have increased only slightly, if at all. The rules of law which made conviction difficult continue to function informally and consent continues to be a unique aspect of sexual assault cases. Although there does seem to be a slight improvement in the victim's experience, researchers have generally concluded that there has been minimal change in the criminal justice system's treatment of sexual violence.

One explanation for the limited success of the reform is that while the content of the law was changed, the reform did not address the response of criminal justice personnel to the

law. Yet, the success of law reform is, in part, dependent upon the way in which criminal justice personnel actually implement the law. Within this framework, judicial decision-making has become a major area of concern. Because judges both adjudicate individual cases and interpret the meaning of the new law, they are in a unique situation to enhance or hinder the effectiveness of the reform in meeting its objectives. Feminists are sceptical that judges collectively will reflect these objectives in their decision-making process. Rather, feminists maintain, myths and misconceptions about the reality of sexual violence will continue to limit judicial understanding of, and response to, sexual violence.

This study examined the impact of the 1983 reform on judicial definitions of sexual violence. Overall, the findings indicate that the reform has been unsuccessful in meeting its objectives at the judicial level. Despite the reform, judges continue to use definitions of sexual violence based on stereotypes and myths which do not accurately reflect the nature of sexual violence and its impact on women.

The study was based on a content analysis of 109 `remarks at sentencing transcripts' from 66 sexual offences cases heard at the Court of Appeal for Saskatchewan between 1975 and 1988. The following findings represent the 9 thematic categories which were investigated.

5.1.1 Violence:

An examination of judicial definitions of `violence' suggests that since 1983 judges have attempted to reflect the 3 tier classification scheme of sexual assault in their sentencing decisions. However, while the law delineated varying degrees of violence, judges have delineated the absence or presence of violence. This distinction presupposes that a sexual offence can occur without violence. It also decreases the seriousness by which all other cases are evaluated and the significance of less serious forms of violence. Overall, these findings indicate that judges tend to minimize the presence of violence in sexual aggression.

In addition, the variables used by judges to determine the extent of violence present in an offence are used inconsistently and occasionally reflect misconceptions about women and their response to sexual victimization. The remaining 8 categories included in this study examined these variables in detail.

5.1.2 Coercion:

An examination of judicial definitions of `coercion' indicated that since 1983 judges mention coercion less frequently than before the reform. Because judges mentioned each relevant theme more often for all of the other categories, this finding was an anomaly in the study. This was a surprise finding because the reform emphasized various

forms of coercion in the 3 tier classification scheme of sexual assault. It is possible that because coercion is now a charging factor, judges do not feel it is important to discuss it at the time of sentencing. This argument is contradicted, however, by the finding that since 1983, judicial references to minor forms of coercion have increased, but references to serious forms of coercion have decreased dramatically. This suggests that if judges are attempting to reflect the 3 tier classification of sexual assault in their decisions, they are seriously minimizing the presence of coercion.

In addition, judicial definitions of coercion tend to focus on the presence of physical `force' such as the presence of weapons, threats of bodily harm, the presence of bodily harm, and the presence of more than one attacker. While psychological forms of coercion, such as threats, were recognized, they were also occasionally minimized. There was little recognition of social forms of coercion.

The tendency not to mention the presence of coercion and the tendency to minimize its presence when it is mentioned are contrary to the reform's objective to emphasize the degree of violence and coercion involved in sexual offences.

5.1.3 Physical impact of the offence on the victim:

An examination of judicial definitions of the physical impact of the offence on the victim indicated that since 1983

judges more frequently refer to the degree of physical impact involved in the offence. But the analysis also revealed that judges tend to minimize the extent of this impact. During sentencing, judges tend to rely on the need for medical treatment as evidence of `injury' when delineating the severity of harm involved in the offence. This tendency may reflect the legal definition of `bodily harm' included in the Criminal Code.[1] However, judges are not consistent in defining the significance of the these injuries. As a result, an injury considered serious by one judge may be considered non-serious by another. Furthermore, the narrow definitions of sexual assault and its impact on victims indicates that the penetration/sexual interference is not seen as a physical impact. In addition, certain forms of physical impact are ignored. As a result, judges frequently minimize the physical impact of sexual offences on the victim.

5.1.4 Psychological impact of the offence on the victim:

An examination of judicial definitions of the `psychological impact' of the offence on the victim indicated that since 1983 judges are considering the psychological impact of the offence on the victim more frequently in their sentencing decisions. However, the findings indicated that judges also tend to minimize the psychological impact of sexual attacks. Furthermore, judges frequently relied on variables other than psychological criteria, such as the

victim's demeanour in court, to determine the presence of, and extent of, a psychological impact.

5.1.5 Breach of Trust:

Judges tended to use narrow definitions of `breach of trust'; that is, a definition based on the abuse of authority relations, such as a parent-child relationship. However, even within this narrow definition, judges frequently did not mention the presence of breach of trust in their sentencing decisions. As a result, judges failed to systematically recognize and/or acknowledge the seriousness of sexual violence by an acquaintance or a person with whom the victim has had an intimate relationship. This problem was further demonstrated in offences which involved previous marriage or sexual partners. Whereas judges usually define the `breach of trust' of a relationship as an aggravating factor, they tend to define the exploitation of a previous intimate relationship as a mitigating factor. Although there appears to be a greater awareness of `breach of trust' by those with authority or those who exploit a young victim's vulnerability and trust, judges fail to mention the presence of `breach of trust' in a large proportion of cases.

5.1.6 The significance of `penetration':

An examination of judicial definitions concerning the `types of sexual acts involved in the offence' suggested that

judges continue to focus on the type of sexual act involved in the offence. They tend to emphasize penile-vaginal penetration as the ultimate violation and thereby underestimate the significance of other forms of violations. The data suggest that penile-vaginal penetration has, in fact, changed from a charging factor to a sentencing factor (Ruebsaat, 1985). This emphasis highlights the `sexual' component of sexual aggression rather than the violence and coercion involved. Therefore, this substantially undermines the objective of the reform to redefine sexual offences as crimes of violence.

This emphasis also continues to produce a bias against homosexual acts of sexual aggression. Although the offences `indecent assault' and rape, which contained gender distinctions, have been eliminated and sexual assault has been `degenderized', the data suggests judges continue to define homosexual acts as more serious than heterosexual acts. As a result, offenders involved in homosexual assaults may be treated relatively harshly. At the same time, violence against women is seen as less deviant or `natural'.

The emphasis on penetration also has serious implications for attempts to clarify what constitutes `sexual' in sexual assault. The emphasis on penetration and `typical' forms of sexual behavior as indicators that an assault is `sexual' implies that consensual and coercive sexual experiences are similar in character. This ignores the significance of sexual

violence as a way to control, humiliate or degrade women.

5.1.7 Accused's criminal history:

An analysis of judicial definitions of the accused's criminal history indicated that judges tend to minimize the accused's responsibility for the offence. They frequently underestimate an offender's propensity to commit sexual violence and describe the accused's behavior as `isolated' or an `aberration'. These findings suggest that judges are reluctant to define an accused as a sex offender unless he repeatedly engages in serious criminal sexual behavior.

In addition, judges vacillate between using previous convictions as an aggravating factor and as a mitigating factor. This tendency is influenced by the variables judges use to determine an accused's propensity to commit crime and may reflect class, race, and gender biases.

5.1.8 Alcohol/drug abuse:

One of the indicators judges used to determine the accused's propensity to commit crime is the presence or absence of alcohol or drug abuse at the time of the offence. Substance abuse is seen as an explanatory factor which generally mitigates the accused's responsibility for the offence. According to judges, the presence of substance abuse explains which men normally of `good character' suddenly commit a sexual offence and why other men are constantly in

trouble with the law.

5.1.9 The accused's control over his sexual drive:

A second indicator of an accused's propensity to commit crime was the accused's control over his sexual drive. Judicial statements indicated that sexual `deviancy', mental illness, duress in the accused's life, or victim provocation all potentially contributed to an offender's uncontrolled sexual drives.

The use of `intoxication' and `uncontrolled passion' as explanatory factors reduces the accused's responsibility for the offence. In addition, it misrepresents the reality of sexual violence because it ignores the degree of planning, manipulation, and coercion which frequently accompanies sexual offences. Finally, it fails to address sexual aggression as a social phenomenon as well as an individual act. Rather, it implies that sexual violence is the product of sick/deviant `individuals' rather than the product of a society which treats women as second class citizens and which exploits, commodifies, and objectifies female (and child) sexuality.

In addition, as judges minimize the offender's culpability, the onus of responsibility is placed on the victim. As a result, judges examine the victim's behavior to determine if it was `appropriate' or `enticing' and they may `blame the victim' for her/his own victimization. This blaming the victim ideology will continue until judges clearly

recognize the degree of violence and the forms of coercion, including the breach of the victim's trust, involved in sexual attacks. In addition, `blaming the victim' will continue until judges formally recognize that women have the `right' to full public participation in society without fear for their safety. It must be clearly understood, and delineated by judges in their statements, that it is not women's behavior which is at issue, but rather, male attitudes and behavior toward women which are problematic.

In conclusion, the findings of this study suggest that the reform has only been partially successful in meeting its objectives at the judicial level. First, the findings suggest that judges are attempting to reflect the 3 tier classification of sexual assault in their decisions. At the same time, however, they tend to minimize the seriousness of each variable. As a result, they tend to minimize the degree of violence and coercion involved in sexual offences, and subsequently minimize the impact of sexual aggression on victims. They also tend to minimize the accused's responsibility for the offence.

These findings suggest, therefore, that despite the reform, many of the myths which previously informed judicial decision-making continue to exist and influence judicial definitions of sexual violence. Furthermore, the findings suggest that even at the sentencing stages, judges continue

to use informal measures of consent and corroboration to determine the seriousness of sexual offences. These informal measures include a reliance upon visible and serious forms of violence, coercion, physical and psychological impact on the victim, and consideration of the victim's behavior both prior to and after the offence occurred. Thus problematic rules of law which were abrogated in the 1983 reform continue to influence judicial decision-making concerning sexual offences. Therefore, the reform's objective to make the treatment of sexual offences more comparable to other violent crimes has not been successful.

Another significant finding was that the `sexual' element continues to predominate in judicial definitions of sexual aggression rather than the `violent' element. This is contrary to the reform's objective to emphasize the violence inherent in sexual aggression. More importantly, this implies that judges believe that `coercive' sexuality has the same sexual character as consensual, `non-coercive' sexuality. This perception is contrary to the experiences of victims of sexual aggression. It also suggests that victims who are sexually active or who are victimized by a person with whom they have shared an intimate relationship are unlikely to obtain equal `justice' before the law as other victims do. Finally, a focus on the sexual element of sexual aggression perpetuates a focus on sexual assaults which resemble `stranger rapes' with overt signs of violence involved. If

judges do not understand or acknowledge this basic distinction between coercive and non-coercive sexuality when dealing with sexual assaults, they are even less likely to recognize or understand women's concerns over other forms of sexual aggression such as harassment and `petty rapes' (Medea and Thompson, 1974).

5.2 SUGGESTIONS FOR FURTHER RESEARCH

There are a number of important issues which need to be addressed in order to adequately assess the impact of the 1983 reform. The following discussion addresses a few limitations of this study and suggests areas for further research.

First, although the cases examined occurred over an extended time period and included a wide range of sexual offences, the cases examined may not be representative of cases which are not appealed. In addition, the study was based on a small sample of cases specific to Saskatchewan and is not, therefore, representative of all cases in Canada. It is very possible that regional disparities exist. There is, therefore, a need for a national study of the issues which were examined in this study. The Metro Action Committee on Violence Against Women and Children (METRAC) in Toronto has been examining similar issues to those presented here. Unfortunately, because it has had difficulties in obtaining data, its findings are also not representative of all the regions in Canada.[2]

Second, judges' remarks at sentencing represent only a small portion of what judges say about sexual offences. Therefore, these remarks may not be representative of the way in which judges respond to sexual violence throughout the criminal justice process. In fact, an informal review of other data suggests that this study may seriously understate the problems associated with judicial responses to sexual violence. An examination of other forms of judicial communications, such as the trial judgments or transcripts, would be useful for establishing the reliability and validity of this study's findings. In addition, this research should be supplemented by further quantitative research, such as examining correlations between judicial statements and the decisions they actually implement. For example, it is important to examine the link between what judges say and what they do, and the implications this has for sentencing.

Third, further longitudinal studies are needed to assess the impact of the reform. It is possible that changes in the legislation and education may produce a new generation of judges whose definitions will more accurately reflect the reality of sexual violence. This study indicates that judges are attempting to reflect the 3 tier classification scheme of sexual assault in their sentencing decisions. The significance of this shift should not be ignored! This shift may provide the base for greater change in the future. However, judges need better criteria for assessing sexual

assault. Special attention should be given, therefore, to analyses of the impact of education programs about sexual violence which have been designed for judges. These education programs, which have been implemented in the United States and are now appearing in Canada, are important tools for facilitating greater judicial understanding of the nature of, and impact of, sexual violence (Brown, 1988).

A fourth issue which should be examined in greater detail is whether the presence of female lawyers and judges influences the way in which sexual violence is defined and treated. This issue is particularly important given the argument of many radical feminists that the placement of women in positions of power can change the patriarchal relations of our society.

Finally, further analyses are need to examine the impact of the reform at all stages of the criminal justice system. This includes analyses of judicial decision-making prior to sentencing decisions, as well as the remarks of the defending lawyer and the prosecuting attorney.

5.3 CONCLUSION

This study has demonstrated that despite legislative reform aimed at emphasizing the degree of violence and coercion involved in sexual offences, judges continue to minimize the seriousness of sexual violence. It appears that in general the reform has not been successful in obtaining its

objectives. However, change does appear to have occurred in that judges are attempting to reflect the 3 tier classification scheme of sexual assault in their sentencing decisions. Unfortunately, misconceptions about the reality of sexual violence and a tendency to distinguish between types of corroboration and levels of consent when determining the seriousness of the offence continue. This suggests the need for further education of judges and other criminal justice personnel to ensure continued change and greater understanding of the objectives of the reform.

Although the 1983 reform did not, and can not, eliminate inadequate responses to sexual violence, it may have important ramifications in the future. From the socialist feminist perspective, this thesis can be seen as reflecting the view that law reform constitutes an arena of struggle. Law reform, therefore, is a dynamic process which will continue to evolve. It is the role of feminists to facilitate its evolution so that the law will reflect the reality of sexual violence rather than the myths. The battle for `justice' and `safety', however, has just begun.

CHAPTER 5 NOTES:

1.According to S.265(4) of the Criminal Code, `bodily harm' means any hurt or injury to the complainant that interferes with his or her health or comfort and that is more than transient or trifling in nature.

2.Saskatchewan is one of the regions which has not been included in their study. This research paper, therefore, fills an important gap in METRAC's attempts to conduct a national sample.

APPENDIX A

LIST OF CASES

01	R. v. Allbright	(1984) 34 SASK.R. 225 CA
02	R. v. Anderson	(1988) 66 SASK.R. 113 CA
03	R. v. B., M.	(1987) 53 SASK.R. 55 CA
04	R. v. B., M	(1988) 62 SASK.R. 79 CA
05	R. v. Badger	(1986) 43 SASK.R. 291 CA
06	R. v. Bear	(1984) 30 SASK.R. 116 CA
07	R. v. Bear	(1982) 13 SASK.R. 379 CA
08	R. v. Boliantz	(1987) 56 SASK.R. 78 CA
09	R. v. Brown	(1988) 59 SASK.R. 220 CA
10	R. v. Burglar	(1978) CA #7936 N/R
11	R. v. B., G.	(1988) 65 SASK.R. 134 CA
12	R. v. Campbell	(1987) CA #2710 N/R
13	R. v. Campbell	(1978) CA #8016 N/R
14	R. v. Charlette	(1978) CA #7850 N/R
15	R. v. Clarke	(1988) 61 SASK.R. 197 CA
16	R. v. Collier	(1976) CA #6657 N/R
17	R. v. Daniels	(1985 CA #2038 N/R
18	R. v. Desbiens	(1986) 43 SASK.R. 169 CA
19	R. v. Elder, Hue, and George	(1978) CA #7756,7745 N/R
20	R. v. Genaille	(1982) 17 SASK.R. 268 CA
21	R. v. Gordon	(1984) 34 SASK.R. 232 CA
22	R. v. Grohs	(1988) 59 SASK.R. 65 CA
23	R. v. Hamilton	(1978) CA #7794 N/R
24	R. v. Hnidy	(1982) 13 SASK.R. 172 CA
25	R. v. Irving	(1982) 13 SASK.R. 391 CA
26	R. v. Jacks III	(1987) 50 SASK.R. 150 CA
27	R. v. Kennedy	(1977) CA #7123 N/R
28	R. v. Legebokoff and Legebokoff	(1982) 14 SASK.R. 213 CA
29	R. v. Littlespruce	(1976) CA #6958 N/R
30	R. v. Maley and Edgington	(1986) 43 SASK.R. 178 CA
31	R. v. McGuniness	(1986) 43 SASK.R. 98 CA
32	R. v. Meestro	(1988) 66 SASK.R. 122 CA
33	R. v. Petrovich	(1981) 11 SASK.R. 242 CA
34	R. v. Poll	(1988) 61 SASK.R. 168 CA
35	R. v. Portras	(1978) CA #7490 N/R
36	R. v. Probe	(1983) CA #817 N/R
37	R. v. Quewezance and Anaskan	(1977) CA #7313 N/R
38	R. v. Robillard	(1982) 18 SASK.R. 255 CA
39	R. v. Rush	(1983) 24 SASK.R. 79 CA
40	R. v. Scheiber	(1982) 14 SASK.R. 7 CA
41	R. v. Shaw	(1976) CA #6428 N/R
42	R. v. Skiftun	(1988) 62 SASK.R. 21 CA
43	R. v. T., B.	(1988) 58 SASK.R. 293 CA
44	R. v. Thomas, Whitefish and Rabbitskin	(1984) 32 SASK.R. 234 CA
45	R. v. Tillotson	(1983) 19 SASK.R. 283 QB
46	R. v. Vermeylen	(1977) CA #7205 N/R
47	R. v. Vermeylen	(1983) CA #700, 739 N/R

48	R. v. Webb	(1984) CA #1292 N/R
49	R. v. Westgard	(1988) 60 SASK.R. 123 CA
50	R. v. Whitney	(1986) 45 SASK.R. 280 CA
51	R. v. York	(1985) 45 SASK.R. 134 CA
52	R. v. Foley	(1988) 67 SASK.R. 247 CA
53	R. v. Lapointe	(1987) 50 SASK.R. 107 CA
54	R. v. McPartlin	(1988) 67 SASK.R. 265 CA
55	R. v. Rogers and Thurber	(1987) 55 SASK.R. 198 CA
56	R. v. Sauer	(1986) 52 SASK.R. 155 CA
57	R. v. Spicer	(1985) 36 SASK.R. 234 CA
58	R. v. Noble	(1988) 62 SASK.R. 28 CA
59	R. v. Young	(1977) CA #6515 N/R
60	R. v. McCallum	(1987) CA #2790 N/R
61	R. v. Gore	(1978) CA #8150, 8183 N/R
62	R. v. Drummond	(1985) CA #1639 N/R
63	R. v. Montgrand	(1975) CA #6629
64	R. v. Y.M.D.	(1988) 68 SASK.R. 204 CA
65	R. v. G.B., B.A., and C.S.	(1988) 65 SASK.R. 134 CA
66	R. v. G.B. et al.	(1988) 65 SASK.R. 134 CA

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